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WASHINGTON REPORTS

VOL. 36

CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

SEPTEMBER 21, 1904—FEBRUARY 4, 1905

ARTHUR REMINGTON

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JUDGES
OF THE
SUPREME COURT OF WASHINGTON

DURING THE PERIOD COVERED IN THIS VOLUME

HON. MARK A. FULLERTON, CHIEF JUSTICE

HON. THOMAS J. ANDERS
(Term expired January 10, 1905)

HON. RALPH O. DUNBAR

HON. WALLACE MOUNT
(Chief Justice after January 10, 1905)

HON. HIRAM E. HADLEY

HON. FRANK H. RUDKIN
(Succeeded Judge Anders January 10, 1905)

HON. MILO A. ROOT
(Appointed January 19, 1905)

HON. HERMAN D. CROW
(Appointed January 19, 1905)

ATTORNEY GENERAL

HON. W. B. STRATTON

HON. JOHN D. ATKINSON
(Succeeded Mr Stratton January 10, 1905)

CLERK - - - - - C. S. REINHART

JUDGES

OF THE

SUPERIOR COURTS OF WASHINGTON

During the Pendency Therein of the Cases Reported in this Volume.

COUNTIES.	JUDGES.
Spokane and Stevens	Hon. WILLIAM E. RICHARDSON.
Spokane	{ Hon. GEORGE W. BELT.
	{ Hon. LEANDER H. PRATHER.*
	{ Hon. HENRY L. KENNAN.†
Whitman	Hon. STEPHEN J. CHADWICK.
Adams and Lincoln	Hon. CHARLES H. NEAL.
Chelan, Douglas, Okanogan and Ferry	Hon. CHARLES VICTOR MARTIN.
Walla Walla	Hon. THOMAS H. BRENTS.
Columbia, Garfield and Asotin .	Hon. CHESTER F. MILLER.
Kittitas, Yakima and Franklin .	Hon. FRANK H. RUDKIN.
Clarke, Skamania, Cowlitz and Klickitat	Hon. ABRAHAM L. MILLER.
Lewis, Pacific and Wahkiakum .	Hon. ALONZO E. RICE.
Chehalis	Hon. MASON IRWIN.
Thurston and Mason	Hon. OLIVER V. LINN.
Pierce	{ Hon. WILLIAM H. SNELL.
	{ Hon. THAD HUSTON.
	{ Hon. WILLIAM O. CHAPMAN.
King	{ Hon. WILLIAM R. BELL.
	{ Hon. ARTHUR E. GRIFFIN.
	{ Hon. BOYD J. TALLMAN.
	{ Hon. G. MEADE EMORY.*
	{ Hon. GEORGE E. MORRIS.†
	{ Hon. ROBERT B. ALBERTSON.
Clallam, Jefferson and Island .	Hon. GEORGE C. HATCH.
Skagit and San Juan	Hon. GEORGE A. JOINER.
Kitsap and Snohomish	Hon. JOHN C. DENNEY.
Whatcom	Hon. JEREMIAH NETERER.

* Term expired January, 1903.

† Term commenced January, 1903.

LAWS 1905, CHAPTER 5.

AN ACT to increase the number of Judges of the Supreme Court of the State of Washington, relating to the powers of said court, and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. The Supreme Court, from and after the passage of this act, shall consist of seven judges.

Section 2. A majority of the judges shall be necessary to form a quorum and pronounce a decision, but the court may provide for any number not less than a quorum to sit from time to time for the hearing of causes: Provided, That when a cause has been presented to a less number than all of the judges and four of the judges so sitting cannot agree on a decision, the parties to the action shall be notified and they shall have the right to resubmit it to the full court under such rules as the court may provide.

Section 3. The vacancies existing in the office of the two additional judges hereby provided for shall be for the term commencing from and after the second Monday in January of the year 1903, and ending on the second Monday in January in the year 1909, and upon the taking effect of this act, shall be filled by appointment by the Governor, and the judges so appointed shall hold their office until the next general election and until their successors are elected and qualified, but the persons so elected shall hold their office only for the remainder of the unexpired term herein provided for, so that at the election of judges for the term commencing from and after the second Monday in January, 1909, three judges shall be elected for the full term of six years and likewise every six years thereafter.

Section 4. An emergency exists and this act shall take effect immediately.

Passed the Senate January 18, 1905.

Passed the House January 18, 1905.

Approved by the Governor January 19, 1905.

ERRATA.

Page 144, line 3. For intent, read attempt.

Page 441, line 9. For amendment, read information.

ERRORS NOTED IN PREVIOUS VOLUMES.

VOLUME 35.

Page 423, after third line, read Affirmed.

Page 427, fourth line from bottom, read:

trial court denied each of appellant's motions, to each of

Page 559, third line from bottom, for Tallman, read Griffin.

Page 762, line 12. For Judgment, 1, read Records, 1.

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CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 5146. Decided September 21, 1904.]

**F. W. SUKSDORF, *Appellant*, v. JOSEPH HUMPHREY *et al.*,
Respondents.**¹

ADVERSE POSSESSION—UNSURVEYED LAND—MISTAKE IN BOUNDARY LINE—CLAIM OF RIGHT. One who settles upon unsurveyed government land and builds a house and makes improvements under a mistake as to where the boundary line will be run, and thereby incloses a strip of the adjoining tract, does not commence to hold such strip by adverse possession until the government lines are established, nor does such party so hold after the establishment of the lines and receipt of the patent, where it appears that no claim was made to any part of the adjoining tract, and that after talk with the adjoining owner about moving back the fence, consent was given that it remain temporarily; hence it is error to conclude that such party was owner in fee of the strip and that title thereto passed to her grantee, who claimed to have purchased without notice of the true boundary line.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered January 4, 1904, upon findings in favor of the defendants, dismissing on the merits an action of ejectment, after a trial before the court without a jury. Reversed.

John M. Gleeson and *James Dawson*, for appellants, to the point that the inclosing and possession of land through

¹Reported in 77 Pac. 1071.

36	1
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36	1
142	160
42	259
42	263

a mere mistake as to the boundary, with no intention of claiming the land outside of the true boundary line, does not constitute adverse possession, cited: *Phinney v. Campbell*, 16 Wash. 203, 47 Pac. 502; *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936; *Preble v. Maine Central R. Co.*, 85 Me. 260, 27 Atl. 149, 35 Am. St. 366, 21 L. R. A. 829; *Knowlton v. Smith*, 36 Mo. 507, 88 Am. Dec. 152; *Finch v. Ullman*, 105 Mo. 255, 16 S. W. 863, 24 Am. St. 383; *Grube v. Wells*, 34 Iowa 148; *Fisher v. Muecke*, 82 Iowa 547, 48 N. W. 936; *Kunze v. Evans*, 107 Mo. 487, 18 S. W. 36, 28 Am. St. 435; 1 Cyc., 1037.

Alfred E. Barnes, *Geo. A. Latimer*, and *Alfred M. Craven*, for respondents, contended, among other things, that the inclosing of lands through a mistake as to the boundary line, under the belief and claim of ownership, constitutes adverse possession. *Ramsey v. Glenny*, 45 Minn. 401, 48 N. W. 322, 22 Am. St. 737; *Levy v. Yerga*, 25 Neb. 764, 41 N. W. 773, 13 Am. St. 525; *Battner v. Baker*, 108 Mo. 311, 18 S. W. 911, 32 Am. St. 606; *Caufield v. Clark*, 17 Ore. 473, 21 Pac. 443, 11 Am. St. 845; *Woodward v. Faris*, 109 Cal. 12, 41 Pac. 781; *Yetzer v. Thoman*, 17 Ohio St. 130, 91 Am. Dec. 122; *French v. Pearce*, 8 Conn. 439, 21 Am. Dec. 680; *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936.

PER CURIAM.—Respondents have made a motion to strike the statement of facts, “for the reason that the same does not contain all of the material evidence adduced at the trial,” and in their argument mention a number of exhibits as not being attached to the statement. The exhibits are attached to the statement, and the court’s certificate seems to be in proper form. The exhibits became a part of the record when they were introduced and received as evidence in the case, and the date of their physical annex-

Sept. 1904]

Opinion Per Curiam.

ation to the statement is not material so long as they are sufficiently endorsed and marked for identification. Motion denied.

This was an action in ejectment, commenced by the appellant against the respondents to recover possession of a certain strip of land, containing about 4.3 acres, along the east line of sec. 1, tp. 25 N., R. 45 E., W. M. Section 6, tp. 25 N., R. 46, and sec. 1, tp. 25 N., R. 45, situate in Spokane county, are coterminous. The west line of section six is the east line of section one, and this line is also the northern part of the township line between townships 25 and 26. The east half of section one is surveyed in subdivisions, designated as lots 1, 2, 7, and 8, and the southeast quarter. Section six is a fractional section, consisting of about 150 acres, and is divided into lots 1, 2, 3, 4, and 5. Section one was railroad land. The record title to lot 8, and the southeast quarter and other parts of the section, was acquired by the appellant from the Northern Pacific Railway Company in 1902, by a deed issued in compliance with a contract executed in 1897. In the year 1884 one Anna Boehrig and her husband settled upon section six, with a view to acquiring it under the homestead laws, but at that time the line between section six and section one had not been established by the United States; and, in building their house and making their other improvements, the testimony shows that it was their intention to build the house and make the improvements on said section six; that subsequently, in 1897, when said boundary line between section one and section six was established by the United States, it was found that their fence ran over the line, and inclosed 4.3 acres in section one, being the land in dispute. The house was partly in section one and partly in section six. A number of fruit trees also were set out upon the tract in question. Some time prior to 1902, the

said Anna Boehrig—her husband having previously died—made proof upon her homestead in section six, and that year sold the same to respondents.

Respondents in their answer deny the material allegations of the complaint, and, as an equitable defense, claim title by reason of open, notorious, adverse possession under a claim of right, in themselves and their grantor, for more than ten years. It was stipulated that the property described in the deed from Mrs. Boehrig to the respondents was lots 2, 3, 4 and 5, of section six. The testimony clearly shows that, when the Boehrigs settled there, they intended to, and thought they had, put their improvements all east of where the line would ultimately be established between sections one and six; that they did not intend to claim any part of section one; that the plaintiff and Mrs. Boehrig were old friends; that, at the time the survey was made by the government in 1897, Mrs. Boehrig had become a widow; that the plaintiff had talked to Mrs. Boehrig about moving the fence back to the line, but that Mrs. Boehrig had explained that she was unable to do it herself, and that her children were too small to be of any assistance; that the plaintiff consented that the fence remain temporarily where it was; that Mrs. Boehrig had moved to Spokane before selling the property; that there is a conflict in the testimony as to whether Mr. Humphrey knew where the lines were when he bought the property, Mrs. Boehrig having testified that she told Mr. Humphrey that she did not own the strip in section one, and could not sell it to him, and Mr. Humphrey having testified that she did not so inform him until some two weeks after he purchased the land. The lower court found, as a conclusion of law, that Anna Boehrig became and was the owner in fee of said strip of land by adverse possession long prior to the commence-

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ment of the action, and rendered judgment dismissing the action.

The only question involved in this action is as to whether the possession by Anna Boehrig of the land in question constituted open, notorious, adverse possession under a claim of right. In *McAuliff v. Parker*, 10 Wash. 141, 38 Pac. 744, this court said:

"All the authorities hold that the question of adverse possession is a question of fact, and it must be a possession that is known to the owner of the legal title."

For the purposes of this case, it might be assumed that the land in question was, prior to 1897—when the township line was surveyed by the government—unsurveyed government land, and, there being no question of acquiescence in a division line, the possession of respondents' grantor was that of a mere squatter; and that the statute of limitations did not commence to run against the appellant, at least until the line was established in 1897. The statute commenced to run on the date that the right of action accrued to the appellant or his grantor. In *Sedgwick & Wait, Trial of Title to Land* (2d ed.), at page 50, it is said:

"The party who seeks to change the possession by ejectment, must first establish a legal title to it."

No doubt the legal title to all of the surveyed land was in the Northern Pacific Railroad Company when the map of definite location was filed in 1880, and an action in ejectment might have been maintained against any person subsequently taking possession thereof; but not so with reference to the unsurveyed land. The government was inviting her citizens to settle upon the unsurveyed public domain, and it is hardly necessary to cite authorities to the effect that an action in ejectment will not lie until the plaintiff can locate the boundaries of his land with

some degree of certainty. For the same reason, possession in a defendant cannot be adverse to the true owner, especially when the intention to claim adversely is wanting. In the case of *Bowers v. Ledgerwood*, 25 Wash. 14, 64 Pac. 936, a case remarkable for its similarity to the case at bar—the only difference being that the land in that case had been surveyed—the court quotes with approval the following rule, with reference to title by adverse possession:

“If one by mistake inclose the land of another, and claim it as his own, his actual possession will work a dis-seizure, but if, ignorant of the boundary line, he makes a mistake in laying his fence, making no claim, however, to the lands up to the fence, but only to the true line as it may be subsequently ascertained, and it turns out that he has inclosed the lands of the adjoining proprietor, his possession of the land is not adverse.”

In the *Bowers v. Ledgerwood* case, *supra*, the court decided in favor of the party claiming by adverse possession. The land being surveyed, the owner must be presumed to know where his lines are, and, if his rights are encroached upon, his right of action would accrue at once. In the case at bar, Mrs. Boehrig, no doubt, claimed the land up to the fence prior to the time it was surveyed, solely upon the supposition that it was in section six; but she did not claim it afterwards, and we cannot indorse the doctrine that a person may be held to be the owner of land by reason of adverse possession, when such person did not intend to hold the land against all the world under any and all circumstances.

Judgment reversed.

[No. 4769. Decided September 21, 1904.]

A. B. EASTHAM, *Respondent*, v. WESTERN CONSTRUCTION
COMPANY, *Appellant*.¹

CONTRACTS—CONSTRUCTION—PERFORMANCE—CERTIFICATE OF ENGINEER. Where a railroad contract for the clearing of a right of way provides for payment upon the certificate of the chief engineer that the same has been fully completed, a certificate that he has "accepted" the work is all that is required.

SAME—AGREEMENT FOR CUTTING WOOD—AMOUNT CALLED FOR. Where a railroad contract for clearing right of way at a stated price per acre, contains the following: "Cutting cord wood 2 ft. long, not to exceed 1,000 cords . . . \$1.50," the contractor is not required to cut 1,000 cords, but it is optional with him to cut any amount not exceeding 1,000 cords, at \$1.50 per cord.

Appeal from a judgment of the superior court for Clarke county, A. L. Miller, J., entered December 13, 1902, upon the verdict of a jury rendered in favor of plaintiff in an action upon contract. Affirmed.

Long & Sweek and *James P. Stapleton*, for appellant.

W. W. McCredie, for respondent.

MOUNT, J.—Appellant entered into a written contract with one William Laughlin, wherein said Laughlin agreed to clear that portion of the line of the Portland, Vancouver & Yakima Railway Company, beginning at Station 796, and continuing to Station 1063½, a distance of about five miles. Among other things, the contract provided that the said Laughlin should execute the said work in a substantial and workmanlike manner, and to the satisfaction and acceptance of the chief engineer of the Portland, Vancouver & Yakima Railway Company." The contract provided:

¹Reported in 77 Pac. 1051.

"That upon the certificate of the chief engineer that the work contemplated under this contract has been fully completed and finished, agreeably to the various stipulations and specifications of this agreement, together with his estimate of the quantity of the various kinds of work done by said party under this agreement, which estimate shall be final and conclusive between the parties hereto," the appellant should pay to the said Laughlin, within thirty days after the delivery of said certificate, \$39.50 per acre. Inserted in the contract were these words:

"Cutting cord wood, 2 ft. long, not to exceed 1,000 cords, ricked along road bed as directed by Chf. Engineer, \$1.50."

After the clearing had been done, and after Laughlin had cut one hundred and one and one-half cords of wood, the chief engineer issued a certificate as follows:

"Western Construction Company, City: This is to certify that I have accepted clearing on main line extension between Sta's 796 plus 30 and 851 plus 20; 864 plus 50 & 884; 896 & 1066. Comprising 47.84 acres.

'F. M. Kettenring, Chief Engineer."

Thereafter Laughlin assigned his claim to respondent, who brought this action against appellant, claiming a balance due thereunder amounting to \$782.78 for clearing, and \$20.30 for wood cut. The complaint alleged a modification of the contract, by the omission of certain clearing included therein and a substitution of clearing not included in the contract, and a full compliance with the modified contract. It also alleged that a certificate of the engineer was given as required by the contract, and the failure of the appellant to pay for the work done. The answer admitted the original contract, but denied any modification thereof, and also denied that plaintiff had performed his contract; and, by way of affirmative defense, alleged that Laughlin was, by the terms of the contract,

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required to cut one thousand cords of wood, and that he had refused to cut more than one hundred and one and one-half cords, and that appellant had thereby been damaged \$449.25 in excess of the amount due on the contract. Plaintiff denied the new matter in the answer. Upon the issues thus made the cause was tried to a jury, which returned a verdict in favor of the plaintiff. From a judgment rendered thereon, the defendant appeals.

Appellant for a reversal of the judgment presents two questions on this appeal, as follows: (1) That the engineer's certificate does not show that Laughlin complied with the contract; (2) that the contract required Laughlin to cut one thousand cords of wood. The certificate of the engineer shows conclusively that he accepted the clearing which was to be done under the modified contract. It is true that the certificate does not state in the language of the agreement that the contract "has been fully completed and finished agreeably to the various stipulations and specifications of the agreement," yet that must necessarily follow when the engineer certifies that he has accepted the work.

We also think the lower court properly held that the contract did not require Mr. Laughlin to cut one thousand cords of wood. The contract was essentially one to clear the timber and brush from the right of way. After stating the price per acre for "clearing right of way," it contained these words: "Cutting cord wood, 2 ft. long, not to exceed 1,000 cords, ricked along road bed as required by Chf. Engineer, \$1.50." There was no other provision in the contract referring to cord wood, and respondent nowhere therein agreed to cut any certain number of cords, unless the words stated are held to amount to such an agreement. We think the contract upon its face clearly shows that the parties intended that wood should be

cut at the option of Mr. Laughlin, in any amount not to exceed one thousand cords. This was the maximum he was at liberty to cut, under the terms of the agreement. A number of cases are cited by the appellant to the effect that, where one party makes a contract to furnish to another all the goods that may be ordered within a certain time, not to exceed a certain amount, then the contract will not be satisfied with less than the limit named. There is no doubt about this rule. But it seems clear to us that Mr. Laughlin is the party who should fix the number of cords of wood which shall be cut, within the limit of one thousand. He was at liberty to cut cord wood from the clearing in any amount not to exceed the limit, and was entitled to pay therefor at the rate of \$1.50 per cord. The construction company authorized him to cut no more than that amount.

The judgment is affirmed.

FULLERTON C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 4467. Decided September 21, 1904.]

CHARLES P. COEY, *Appellant*, v. JAMES R. LOW *et al.*,
Respondents.¹

REPLEVIN—SOURCE OF TITLE—PLEADING—DEFENSES—SHOWING INVALIDITY OF TITLE UNDER GENERAL DENIAL. Where the plaintiff in an action of replevin alleges generally the ownership and right of possession of certain wheat, and at the trial claims by virtue of a written lease of the lands on which the wheat was raised, the defendants may show the invalidity of the lease under a general denial, since they need not anticipate the source of plaintiff's title when the same is not disclosed by the complaint.

INDIANS—CONTRACTS—LEASES—APPROVAL BY INDIAN DEPARTMENT. A lease of lands in the Cœur d'Alene Indian reservation from an Indian to a white man is void unless approved by the Indian department.

¹Reported in 77 Pac. 1077.

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REPLEVIN — WHEAT RAISED UNDER INVALID LEASE — POSSESSORY RIGHTS—INDIAN LEASE NOT APPROVED BY DEPARTMENT. Where the plaintiff leased lands in a reservation from the Indian owner by a written lease, which was void because not approved by the Indian department, and subsequently sublet the same on shares, furnishing the seed and paying for threshing the wheat raised, and his share was set aside for him by the sub-tenants, but the same came into the possession of the Indian owners of the land, claiming the right thereto, replevin will not lie in favor of the plaintiff on the theory that courts will protect the possessory right under such circumstances; since the plaintiff was never in the actual possession of the land or the wheat, and cannot claim constructive possession by virtue of an unlawful lease.

Appeal from a judgment of the superior court for Clarke county, A. L. Miller, J., entered December 13, 1902, upon findings in favor of the defendants, after a trial before the court without a jury, dismissing on the merits an action of replevin. Affirmed.

Moore & Corbett, for appellant.

Merritt & Merritt, for respondents.

PER CURIAM.—Charles P. Coey commenced this action in the superior court of Spokane county against James R. Low, Virginia Low, his wife, Ted Butler, and the Sheldon Milling Company, a corporation, to recover the possession of five hundred sacks of wheat, or \$400, its value, in case a delivery thereof cannot be had, with damages for unlawful detention, and also costs and disbursements. The plaintiff in his complaint alleged ownership of, and right of possession to, such personal property, and that the defendants, on the 7th day of October, 1901, at Kootenai county, Idaho, wrongfully took such goods, chattels, and property from his possession. Plaintiff further alleges demand for the restoration of such property, prior to the commencement of this action, and the wrongful detention

thereof by defendants. The defendants, James R. and Virginia Low, and Ted Butler answered by general denial of each and every allegation contained in the complaint. The action was thereafter dismissed on motion of plaintiff as against The Sheldon Milling Company.

The cause came on for trial before the lower court, without a jury. The court made findings of fact and stated conclusions of law, as follows:

"(1) That the wheat described in the plaintiff's complaint was grown upon lands within the Coeur d'Alene Indian reservation. (2) That on the 1st day of April, 1897, one Julian Butler and the plaintiff entered into a contract whereby they agreed that the said Julian Butler leased said land to the plaintiff herein for an uncertain and indefinite period, being for such a time that one-third of the crops from said premises would pay certain unknown indebtedness to the plaintiff in this case. (3) That thereafter the plaintiff verbally sublet said premises to True James and William Shearer, who farmed said land in the year 1899, 1900 and 1901, and by the terms of said lease the said True James and William Shearer were to render to the plaintiff herein one-third of all the crops grown on said land during each of said years. (4) That the said True James and William Shearer occupied said lands under said verbal lease during the cropping season of 1901, and grew and harvested the wheat described in the complaint. (5) That the plaintiff herein is a white man residing in the county of Spokane, state of Washington, and not a member of the Coeur d'Alene tribe, and that said written lease entered into by said Julian Butler and the plaintiff and the verbal lease, whereby said premises were sublet by the plaintiff True James and William Shearer, never received any approval of the Indian department. (6) That the plaintiff has no right or title to the wheat described in the complaint, except such right as he might have in law by virtue of the said leases of said Indian lands existing between him and the said Jul-

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ian Butler, and between him and the said True James and William Shearer.

"And as conclusions of law upon the foregoing findings of fact, the court makes and files the following, to wit: That said leases were void and of no force and effect; and that plaintiff was not in possession of said land and did not raise and harvest said wheat; and that the plaintiff is not entitled to recover anything by this action and defendant is entitled to the return of said wheat."

Plaintiff excepted to each finding of fact save the first, and also excepted to the conclusions of law above stated. He requested the trial court to make and state certain findings and conclusions of law in his behalf, establishing his ownership of, and right of possession to, the property in question, at the commencement of the present action. These exceptions were overruled and such requests were denied, and plaintiff duly excepted. Plaintiff thereupon made and filed his motion for a new trial on certain statutory grounds. This motion was denied, exception taken, and judgment was entered in favor of the answering defendants. Plaintiff appeals.

The facts presented in this controversy are practically undisputed. At the trial, the appellant, not having the original lease in his possession or under his control, introduced a copy thereof in evidence, which was excluded by the trial judge, except for the purpose of explaining appellant's possession of the property in controversy at the time of the alleged wrongful taking thereof. Appellant furnished the seed from which the wheat described in the complaint was grown, and paid for the threshing thereof. Witness True James, for appellant, testified in part as follows: that the land on which this wheat was grown was a part of the Coeur d'Alene reservation, in Kootenai county, Idaho; that witness and his brother-in-law, Shearer, leased this land from appellant for three years, begin-

ning in 1899, paying appellant, Coey, one-third of the crops raised thereon. The wheat in controversy was grown on this land in 1901. When the wheat was threshed one-third part thereof was set apart for Coey. Respondent Low, husband of Mrs. Low, notified James and Shearer at that time not to let Coey have any part of the wheat, "and not to let him on the ground. If he come there to put him off." This wheat was afterwards placed in Low's sacks, and hauled into Spokane county, and replevied in the present action, the respondents furnishing a redelivery bond. Witness James further testified, on his cross examination, in response to questions propounded to him:

"Q. You say that you had seen Mr. Low before you commenced threshing? A. Yes. Q. About how long? Two or three weeks or days? A. I don't know how long it was. Q. At that time did he tell you of his wife's claim to the land? A. He told me Mr. Coey had no right at all. . . . Q. You let his men put it in sacks and haul it away? A. Yes, sir. Could not do any other way. Q. Was Coey down? A. No, sir. Q. Coey did not go out at all? A. Never on the land at all."

There was no testimony that the above written lease was ever approved by the Indian department of the United States. Respondents were and are Indians belonging to the Coeur d'Alene tribe. Respondents Virginia Low and Ted Butler are the children of Julian Butler, deceased. James R. Low is the husband of Virginia.

For the purposes of this litigation these parties have been treated as the successors in interest of Julian Butler. Major Albert M. Anderson, agent for the Colville, Spokane, and Coeur d'Alene Indian reservations, testified that he never approved this written lease. Mr. Geo. F. Steele, who was in charge of the Coeur d'Alene reservation in the absence of the agent, testified that, "It was always understood that we could not lease the land. . . . There

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was a written rule in the office, that we went by, that Indian lands could not be leased;" that labor contracts for the first year's crops had been approved. This witness further said: "Yes, I approved of the agreement that Mr. Coey made with old Mr. Butler; that is, I approved of it by stating verbally I thought the agreement was a very good way to get straightened up with their debts."

The assignments of error are presented and argued in appellant's behalf under two heads. It is contended that the trial court erred in holding the two leases, noted in the findings and conclusions of law, void. It is stated in appellant's brief that,

"The validity or illegality of the leases was not a matter in issue. There was no pleading putting the same in issue. The defendants, to avail themselves of any illegality of the leases, or to raise any question as to same, were bound to plead such illegality."

The case of *Maitland v. Zanga*, 14 Wash. 92, 44 Pac. 117, is cited in support of such contention. The case cited was an action brought to recover damages on an agreement to convey land. The complaint disclosed the nature of the agreement on which the action was founded; the illegality of the contract did not appear from the face of the pleading, but depended on collateral facts. Judge Dunbar observed, in delivering the opinion of the court:

"But, while it is true that the courts will not enforce illegal contracts, the fact that such contract is illegal must be determined like any other fact, and to be fairly determined it must be made an issue by the pleadings, or be determined by the admission of the plaintiff or by testimony which, in the language of the supreme court of the United States, 'must necessarily prove the illegality of the contract,' as in the instance cited by the court, or where some public record was introduced which could not be disputed. In that event the reason for requiring it to be pleaded would not attach."

Further along in such opinion, the case of *Ah Doon v. Smith*, 25 Ore. 89, 34 Pac. 1093, is cited, from which the following language is quoted with approval: "No waiver by the defendant, or neglect to plead such defense, can oblige the court to entertain an action founded upon an illegal or immoral contract, when such illegality appears." There is no question as to the general rule of pleading, that the facts constituting the plaintiff's cause of action and the defendant's grounds of defense must be alleged. But this principle has never been carried so far that a party defendant must, at his peril, anticipate in his answer evidentiary matters which may, or may not, be introduced at the trial of the action, in support of plaintiff's complaint, in which no reference thereto has been made. This rule has been most frequently recognized and applied with regard to the necessity of pleading, as ultimate facts, evidences of title in actions for the recovery of real estate and specific personal property. *Chamberlin v. Winn*, 1 Wash. 501, 20 Pac. 780; *Kerron v. Northern Pac. Lumb. etc. Co.*, 1 Wash. 241, 24 Pac. 445; *Gila Valley etc. R. Co. v. Gila County* (Ariz.), 71 Pac. 913, and authorities cited. A good illustration of the proposition of law under discussion is furnished in actions for the recovery of goods and chattels, wherein plaintiff alleges ownership thereof in general terms, and, at the trial, seeks to sustain his allegations in that behalf by introducing in evidence a bill of sale in which he is named as vendee of such property. It is held that a defendant, under a general denial in such cases, may prove the instrument, under which plaintiff claims, fraudulent and void as to his (defendant's) rights in the property sought to be recovered. "This rule is doubtless based on the fact that in replevin the plaintiff is not bound to disclose any source of title, and therefore the defendant is

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not bound to anticipate the source of title under which the plaintiff may claim." *Jones v. McQueen*, 13 Utah 185. See, further, Cobbey, Replevin (2nd ed.), §§ 752, 755; *Gallick v. Bordeaux*, 22 Mont. 470, 56 Pac. 961. We think that, in this class of actions, when a plaintiff fails to disclose the source of his title to the property that he seeks to recover, the defendant may show, under a general denial, that the instrument under which plaintiff claims title is illegal. Furthermore, courts will not lend their aid in any event to the enforcement of illegal agreements. *Minnesota Sandstone Co. v. Clark*, 35 Wash. 466, 77 Pac. 803. In the case of *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605, the following pertinent language is used by Justice Lyon, delivering the opinion of the court:

"The general rule of law is, that all contracts which are repugnant to justice, or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statute, are void; and that, if a party claiming a right to recover a debt is obliged to trace his title or right to the debt through any such illegal contract, he cannot recover, because he cannot be allowed to prove the illegal contract as the foundation for his right of recovery. It is quite immaterial whether such illegal contract be *malum in se*, or only *malum prohibitum*. In either case the maxim, *ex turpi causa non oritur actio*, is applicable. And a contract in violation of a statute is void although the statute fails to provide expressly that contracts made in violation of its provisions shall not be valid. It is sufficient that it is prohibited, and its invalidity follows as a legal consequence."

We think that there can be no serious question in this controversy regarding the invalidity of the written contract between Julian Butler and appellant. If the latter had no right of possession in and to this land and the crops grown thereon, it was impossible for him to invest

his tenants, James and Shearer, with any greater rights therein than he himself possessed at the times above stated.

"Undoubtedly, the right of the Indian nations or tribes to their lands within the United States was a right of possession or occupancy only; the ultimate title in fee in those lands was in the United States; and the Indian title could not be conveyed by the Indians to any one but the United States, without the consent of the United States." *Jones v. Meehan*, 175 U. S. 8, 20 Sup. Ct. 1.

Article V, Treaty with Coeur d'Alene Indians; *Light v. Conover*, 10 Okl. 732, 63 Pac. 966. Under the authority last cited, the court held that it was incumbent upon the lessor, in an action against his lessees for the recovery of rent of lands lying within the boundary lines of Indian reservations, to show that he had a valid contract, made with the consent and approval of the Indian agent and the commissioner of Indian affairs, before the lessor could legally enter into any contract to sublet any portion of such lands: and that such subletting must be sanctioned by both agent and commissioner. U. S. Rev. Stat., § 2116. Furthermore, according to the rule enunciated in *Jones v. Meehan*, *supra*, and cases therein cited, it would seem that leases and contracts of this description must be authorized and sanctioned by some act of congress or treaty regulation. Otherwise, such instruments are illegal and void. The trial court committed no error in declaring the foregoing leases void.

The appellant next contends that,

"Conceding, for the sake of argument, that the court was right in holding the contracts leases, and, as such, void, still we insist the court was in error in denying a recovery to appellant. The error consisted in holding that the possession of James and Shearer was not the possession of appellant."

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He was not in the actual possession of the land or wheat in controversy, at the time of the alleged wrongful taking mentioned in his complaint. It is therefore evident that he could not have been in the lawful constructive possession of such property, under an illegal contract by his tenants or otherwise. "The stream cannot rise above its source." If the respondents had forcibly taken this wheat from the actual possession of appellant, while it was on the reservation, and brought it into Spokane county, and appellant had there replevied the property in question, a different proposition would have presented itself for our consideration. *Churchill v. Ackerman*, 22 Wash. 227, 60 Pac. 406. The counsel for appellant have cited numerous authorities on the proposition that, where crops were grown on government land under an invalid lease or contract, courts have been inclined to uphold the possessory title to such crops, of the lessor and lessee, or the party in peaceable possession thereof, under a claim of right made in good faith. *Buckhalter v. Nuzum*, 9 Kan. App. 885, 61 Pac. 310, cited by appellant's counsel, furnishes a fair illustration of the application of this proposition of law. In that case it appeared that the crop of corn, which was the subject-matter of the action, was grown upon the land embraced within the limits of the Iowa Indian reservation, Brown county, Kansas, allotted to Anna E. Richardson, an Indian woman. She entered into a written contract with one Ryan to raise and crib the corn on her land, at the rate of ten cents per bushel. Anna Richardson thereafter assigned, in writing, for a valuable consideration, all her interest in this Ryan agreement to Nuzum, with the assent of Ryan, guaranteeing Nuzum peaceable and full possession of the land mentioned in the contract. Ryan proceeded to plant and raise the crop under the direction of Nuzum. Buckhalter, the plaintiff in error (defendant

in the trial court), claimed title to the corn in controversy by virtue of a levy and sale thereof, under a judgment rendered against Anna E. Richardson and her husband. In the opinion of the court the following language may be found:

"The corn, as claimed by the defendant in error, and as found by the jury, was in the possession of the defendant in error [Nuzum], and was raised and cribbed by him, or under his direction."

The court held that Nuzum was entitled to a restitution of the property, that Buckhalter took nothing by reason of the levy and sale. The distinguishing features between the above case and the action at bar are that the controversy in the Kansas case was not between parties to the original transaction, or their legal representatives, but arose between parties claiming adversely to the allottee and the party in actual peaceable possession of the property replevied. The actual possession of Nuzum, under a claim of right, seems to have been the basis of the decision of the court given in his favor. In the present controversy, the evidence in appellant's behalf shows undisputably that he was not in the actual possession of the wheat in question, or the land on which it was raised. Therefore, he could not have had constructive possession, in any legal sense, under an unlawful contract.

As we find no reversible error in the record, we are of the opinion that the judgment of the superior court must be affirmed, and it is so ordered.

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Statement of Case.

[No. 4741. Decided September 21, 1904.]

S. NORMILE, *Appellant*, v. THE NORTHERN PACIFIC RAIL-
WAY COMPANY, *Respondent*.¹

CARRIERS—FREIGHT—DELIVERY—FLAG STATIONS WITHOUT ANY AGENT—SHIPMENT ON OPEN CAR—LOSS OF GOODS. A railroad company is liable to the consignee for failure to safely deliver goods lost after the arrival of the car at its destination, where it appears that a donkey engine with tools and cables were shipped on a flat car to F, a flag station on defendant's line, where the defendant had a warehouse but no agent, that a postal card notice was mailed to the consignee at F upon arrival of the freight, and the consignee immediately prepared to unload the car, but was unable to do so until the next day, when it was found that the tools and cables, weighing about 1,500 pounds, were missing; since the consignee was not afforded a reasonable opportunity to remove the goods prior to their loss, and the company was bound, both as carrier and warehouseman, to properly care for the goods upon their arrival.

SAME—LACHES OF CONSIGNEE. In such a case the consignee cannot be held guilty of laches in not unloading the car on the 17th day of December when he learned at four o'clock the day before that such a car had arrived at F and his bookkeeper spent the morning of the 17th in ascertaining about the car and in securing a suitable dray, which was not obtained in time to unload that day, and the car was unloaded on the next day.

CARRIERS—DELIVERY—REASONABLE TIME—QUESTION OF LAW. Where there is no dispute as to the material facts, the question as to the reasonable time for the removal of goods shipped is one of law for the court.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 19, 1903, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to recover from a carrier for the loss of goods. Reversed.

John W. Whitham, for appellant.

¹Reported in 77 Pac. 1087.

James F. McElroy and *B. S. Grosscup* (*A. A. Booth*, of counsel), for respondent.

PER CURIAM.—Action brought in the superior court of King county by plaintiff, S. Normile, against defendant, The Northern Pacific Railway Company, on account of the loss of freight. The cause was tried to the court without a jury. The following findings of fact and conclusions of law were made in the trial court:

“(1) That on December 11th, 1901, at Portland, Oregon, the defendant received from the plaintiff for shipment to Fremont, Washington, for the sum of \$34, the following goods, wares and merchandise, to wit, one donkey engine and tool box and two coils of steel cable. (2) That the allegations set forth in paragraph three of plaintiff's complaint are untrue, and that the defendant did safely carry and deliver to the said plaintiff, at Fremont, Washington, in accordance with its contract of carriage, the goods, wares and merchandise herein above described, and that plaintiff has suffered no damage whatsoever. (3) That the allegations set forth in the fourth paragraph of plaintiff's complaint are each and all untrue and that plaintiff has suffered no damage in the sum of one hundred dollars or in any other sum; that there was no failure on the part of the defendant to deliver said property to plaintiff. Wherefore, the court finds as conclusions of law: that plaintiff take nothing by his said action; that the defendant is entitled to judgment for its costs and disbursements herein.”

Plaintiff duly excepted to each of these findings and conclusions, save as to the first finding of fact above noted. These exceptions were overruled in the lower court, plaintiff excepted, and judgment was entered dismissing the action; from which judgment plaintiff prosecutes this appeal.

Paragraph three of the complaint, which is referred to in the findings, is in the following words and figures:

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"That the defendant did not safely carry and deliver the said goods pursuant to said agreement, nor any part thereof, except the said engine, but, on the contrary, the said defendant so negligently conducted and so misbehaved in regard to the same, in its calling as carrier, that the said plow steel cable and the said tool box, together with the tools contained therein, were wholly lost to plaintiff, to his damage in the sum of \$243, the same being the value of said property which the said defendant has failed to deliver to plaintiff."

The respondent company denied the material allegations of the complaint, and pleaded, as a separate defense:

"That at the time said goods were received by defendant for shipment, to wit, December 11, 1901, at Portland, Oregon, it was agreed and understood that said defendant should not be responsible for the loss of any article shipped upon open cars; that said goods were shipped upon open cars and at plaintiff's risk."

Appellant, Normile, by his reply denied all the allegations of this affirmative defense. It was stipulated at the trial that the value of the goods lost was \$243, as alleged in the complaint.

Fremont was, at the time of the alleged grievances, what was termed a flag or prepaid station, located on respondent's line of railroad in King county. The respondent company had no regular agent at such station. The nearest agent of the company at that time was located at Interbay, and had charge of other stations near by, including Fremont, in the matter of the delivery of freight from the cars of respondent company to consignees. Mr. Normile, the appellant, testified, that this railway company had a warehouse or some kind of a building at Fremont; that he received the donkey engine, which was shipped with the tools and cables, from the flat car in proper condition; that these tools and cables were designed for use in connection with such engine; that he knew about the shipment

of this property from Portland on December 11, 1901; that witness expected it would arrive at its place of destination in three or four days thereafter, and that he purchased such property for use in connection with his business, which was that of a contractor; that, in going through Fremont on the street car, about four o'clock in the afternoon of December 16, 1901, he noticed a donkey engine on one of respondent's flat cars, which he supposed was his property; that the next morning he found his bookkeeper, to whom he gave directions to go and ascertain if his said property had arrived; that, when appellant had procured a dray on the morning of the December 18th, for the purpose of removing this property, the tools and cable were missing; that he did not get his mail at Fremont, and received no notice of the arrival of this freight through the mail; that he did not know that Fremont was a flag or prepaid station; that the weight of this merchandise in question was about fifteen hundred pounds, and was in two parcels. Mr. Maitland R. Sanford, appellant's bookkeeper, testified in part as follows:

"Well, it was on the morning of the 17th, possibly half-past nine, that I met Mr. Normile, and he informed me that, in passing through Fremont the night before, he had seen a donkey engine on a flat car there. Well, he was expecting an engine for his work on the canal, and he instructed me to look the matter up and ascertain if that was his, and, if so, to order a dray and remove it. Now, I tried to find the agent, done some telephoning . . . in order to ascertain if that was Mr. Normile's engine before ordering the dray, but I failed to do so. . . . It was nearly noon then, perhaps 11:30; I found a drayman that had a dray of sufficient size to remove the engine, but it was too late for him to get then to Fremont and remove the engine—too late in the day. Well, of course if it was too late for him, it was too late for any other drayman to get there. So that was all I could do, I could not get the

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drayman to take it off on that day. So this drayman came the following morning and it was too late then, the stuff was taken off then, that is, the tool chest and contents and cable. . . ."

Witness, continuing his testimony, said that, after he was notified by appellant of the arrival of the freight, it took an hour and a half to find the agent of respondent before ordering the dray; that he did not find any agent at Fremont station; that there was none there permanently. A. S. Pattullo, the secretary of the Columbia Digger Co., the consignor of this shipment, testified by deposition, that, "the Columbia Digger Co. had nothing to do with the way it was to be shipped, and there was no arrangement in regard to any reduction of freight."

On the part of the defense, the affidavit of Mr. Jas. F. McElroy, by stipulation, was read in evidence. This affidavit related to the testimony of witness Tillotson, who was in the employ of appellant at the time of the arrival of this freight, and was to the effect that the engine and other property, which Mr. Normile stated were there for delivery, were at Fremont on the morning of December 17, 1901, in the same condition as when loaded on the flat car at Portland, where Tillotson helped load this freight; that the dray Mr. Normile had engaged to convey such property from the car, to be used on the Lake Washington canal, did not arrive till December 18, 1901; that witness then went with four assistants to unload such freight from the car on to the dray, and found that the tools and cable had been removed. W. S. Clark, a witness for respondent, testified, in part, that in December, 1901, he was respondent company's agent at Interbay, that he had in his possession the data with reference to the shipment of the above property to appellant; that it arrived at Fremont on December 14, 1901; that the bill of this shipment was re-

ceived by witness about nine o'clock in the morning of that day; that he sent notice of the arrival of this freight to appellant by postal card, which he deposited in the post-office at Ballard on the afternoon of December 14th, directed to Mr. Normile, at Fremont; that the first time witness learned about the loss of this freight was about December 26, 1901, when he received a letter through the mails from appellant's attorney, Mr. Whitham.

The respondent contends that appellant, by preparing to remove these goods on the 17th day of December, 1901, accepted the delivery thereof on the side track at Fremont. For the purposes of this controversy, we think that it is immaterial whether this freight arrived at Fremont on the 14th or 16th of December, 1901, though, from the testimony adduced in appellant's behalf, and the statements contained in Mr. McElroy's affidavit, it would seem that the latter date is the correct one. There is no question but that these goods arrived at Fremont in the same condition as when the same were loaded on the car at Portland, and they were at such station on December 17, 1901. We must bear in mind that the days, at that season in the year, are of short duration.

"Where goods are shipped to a place where there is a side-track, but no depot, platform or agent of the carrier, and this is known to the parties, and is not unreasonable in view of the small amount of business, it has been held that leaving the car of goods upon the sidetrack is a good delivery and relieves the company from further responsibility." Elliott, Railroads, § 1521.

The rule was announced in the case of *Kirk v. Chicago etc. R. Co.*, 59 Minn. 161, 60 N. W. 1084, 50 Am. St. 397, that, while it is usual for the consignees themselves to unload and carry away certain kinds of freight, such as coal, lumber, and the like, directly from the cars:

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"It is also true, . . . that there is nothing to prevent a carrier, at least under special circumstances, from using the car as its warehouse for the storage of freight. But in the case of portable boxes or packages of valuable merchandise we think that, under any ordinary circumstances, . . . in order to terminate the carrier's liability he must remove the goods from the car in which they were transported and place them for safe keeping in his freight house."

It is impossible to formulate any general rule, applicable to all cases, as to what constitutes a good and sufficient delivery of freight by the carrier to consignees. Each case must necessarily, to a great extent, depend upon its own particular circumstances. The question of delivery to a consignee is usually a question of fact, or a mixed question of law and fact, for the jury, under proper instructions from the court. Sometimes, where the facts are undisputed, a question of law only is presented for the decision of the court. Elliott, Railroads, § 1517, and authorities cited.

"It may be stated, generally, that every delivery must be made to the right person, at a reasonable time, at the proper place, and in a proper manner. These are all requisites of a valid delivery, except in so far as a compliance with them may be waived by the party entitled to the goods." Hutchinson, Carriers (2d ed.), § 340.

Unquestionably, as a general rule, the manner of delivery may be regulated by contract, but, in the absence of any specific stipulation upon the subject, it is, in a great measure, determined by custom. The carrier must, however, afford the consignee an opportunity to unload and remove his goods. On the other hand, the consignee must exercise reasonable diligence in the matter of the receiving and removal of his freight. The appellant prepaid the regular freight charges on this shipment, and was entitled to the

protection that the law afforded him in that behalf. The following propositions of law, pertinent to this controversy, are enunciated by a learned author:

"The carrier's responsibility does not end by mere delivery on the platform or dock at the place of destination; there must be such actual delivery as fills the contract of carriers; or, if not applied for by the consignee, the goods must be safely warehoused; then the liability as carrier ceases, and that of warehouseman begins. . . . And so jealous is the law in guarding the rights of shippers against contracts of carriers exempting themselves from the consequences of their own negligence, and so obligatory is the duty of carriers to furnish suitable vehicles and appliances for the transportation of property received to be carried, that the knowledge of shippers of the character of cars furnished will not exempt the company from liability for loss occasioned by the insufficiency thereof, although the contract of shipment be that there shall be no such responsibility on the part of the company." 2 Rorer, Railroads, pp. 1292, 1293.

While it is true that these goods, which were lost or stolen, were intended for use in connection with the donkey engine, and that it was more convenient for the respondent to load the whole shipment on one flat car, as such engine could not well have been placed in a box car for shipment, and that it was intended by both carrier and consignee to be unloaded and received direct from the flat car at the place of destination, still it does not appear by any testimony in the record but that this respondent company might have placed these particular goods (the tools and cable) in its warehouse or building at Fremont station; that otherwise respondent is liable to appellant for their value. It would seem, from the showing made in the record, that appellant was not afforded a reasonable opportunity to enable him to remove these particular goods from the car prior to their loss, and that such loss should be borne by the respondent.

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The principal authority, cited by respondent's counsel in support of their contentions, is *Allam v. Penn. R. Co.*, 183 Pa. St. 174, 38 Atl. 709, 39 L. R. A. 535. The points decided are fairly presented by the syllabus:

"As a general rule a common carrier must give to the consignee of goods, notice of their arrival at the point of destination. While a common carrier cannot stipulate for a release from the consequence of his own negligence or fraud, yet he can modify his liability as such so far as to provide that notice of the arrival of goods need not be given at small stations where no station house has been built and no freight agent located. A contract that at such stations the goods shall be at the 'risk' of the owner until loaded into cars, and when unloaded therefrom is not against public policy and will be enforced. Where goods are carried under such a contract all responsibility for protecting the same after the goods reach their destination is assumed by the consignor."

It would seem that, in the matter of such shipments, the consignor acts as the agent of, or represents, the consignee. In this Pennsylvania case, the bill of lading under which the goods were received by the carrier contained the following provision:

"When merchandise is destined to or from way stations and platforms where station buildings have not been established by the carrier, or where there are no regularly appointed freight agents, it shall be at the risk of the owner until loaded into the cars and when unloaded therefrom; and when received from or delivered on private turnouts it shall be at the owner's risks until cars are attached to and after they are detached from the train."

We find no such stipulation in the bill of lading which was received in evidence in the action at bar. Furthermore, it appeared in the authority last cited, that at Stratford, the place where the goods were to be received, there was no shelter and no regular agent of the carrier company to take charge of the freight upon its arrival. "The only

convenience at Strafford for the receipt and delivery of goods was a platform by the side of the road." Thus, it is plain to be seen that the facts in the *Allam* case are noticeably dissimilar from those in the present controversy; that, while it may have been inconvenient for the respondent to have unloaded the goods in question, and stored them in its station house or building at Fremont, still, in the absence of any express stipulation, it was bound to properly care for these goods upon their arrival, both in the capacity of a carrier and warehouseman, under the well established rules of the common law. See Rorer, Railroads, pp. 1292, 1293.

Regarding the matter of notice to Normile, the consignee, we think that, under the facts as disclosed by the record, no notice was required; but, assuming that such notice was necessary, the agent, unless otherwise advised, had the right to assume that notice addressed to the consignee, at the point of destination, would reach him in the due course of the mail. Appellant, on the arrival of these goods at Fremont station, pursued the safer method of first communicating with the agent, on the 17th day of December 1901, before removing the same from the car. It would therefore seem unreasonable to charge the appellant with laches in not being prepared to receive and remove this freight until the morning following the date last named. There is no showing made in the record other than that the appellant acted with reasonable diligence in this particular. Where there is no dispute about the material facts, this question of reasonable time in which goods are to be removed by the consignee is one of law for the court. *Hedges v. Hudson River R. Co.*, 49 N. Y. 223.

The judgment of the lower court is reversed, and the cause remanded, with instructions to enter a judgment for the agreed value of the goods lost.

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Statement of Case.

[No. 5004. Decided September 27, 1904.]

FRANK S. WEED *et al.*, Respondents, v. THOMAS B.
GOODWIN *et al.*, Appellants.¹

STATUTES—TITLE OF ACT—SUFFICIENCY—EMINENT DOMAIN—RIGHT OF WAY FOR IRRIGATION. LAWS 1899, p. 261, entitled, "An act providing for condemnation proceedings for right of way for irrigation ditches, canals and flumes for agricultural and mining purposes, and relating to right of appropriation of water," is not unconstitutional as embracing more than one subject, since its subject relates singly to the right of appropriation of waters, and all the subsidiary details are germane thereto, and are means for carrying the object into effect, and necessary for its enforcement.

EMINENT DOMAIN—CONSTITUTIONAL LAW—DUE PROCESS—NOTICE. By LAWS 1899 p. 261, for the condemnation of rights of way for irrigation purposes, the filing of a complaint and the issuance and service of a summons, as in civil cases, and the assessment of damages by a jury, provides ample notice and due process of law, although the law contains no express provision that the plaintiff shall maintain the requirements of the statute at the trial, since that is jurisdictional and follows as a matter of course.

SAME—PROVISION FOR DAMAGES ASIDE FROM VALUE OF LAND. LAWS 1899, p. 261, for the condemnation of rights of way for purposes of irrigation, sufficiently provides for the assessment of damages aside from the value of the land taken by directing the jury to "determine the value of the land occupied and damages," and authorizing judgment "for the full amount of the value of the land and damages."

Appeal by defendants from a judgment of the superior court for Kittitas county, Rudkin, J., entered June 25, 1903, appropriating a right of way for irrigation purposes, after a trial on the merits and the assessment of damages by a jury. Affirmed.

Graves & Englehart, for appellants.

Hovey & Hale, for respondents.

¹Reported in 78 Pac. 36.

MOUNT, J.—This proceeding is to appropriate certain lands for a private irrigation ditch for agricultural purposes. It was instituted by the respondents under the provisions of an act of the legislature approved March 14, 1899 (Laws 1899, p. 261). A complaint was filed, and summons served upon the appellants, who appeared in the action and filed a general demurrer to the complaint. This demurrer was overruled, and thereupon appellants filed an answer. The cause was thereafter tried to the court and a jury, the latter being called to assess the damages. The court found, among other things, that respondents' lands are arid agricultural lands and require irrigation; that said lands are irrigated by water obtained from what is known as Tenum ditch; that said ditch does not touch any of respondents' lands, and, in order to obtain water therefrom, it is necessary to carry the same through the appellants' lands; that said water is obtained from a natural stream in Kittitas county. The court also found that appellants refused to grant respondents a right of way for the purpose of said ditch. The jury found and assessed appellants' damages at \$100.

Upon this appeal it is urged that the act in question is void for the reason, (1) that it is in contravention of § 19 of art. 2 of the constitution, which provides that no bill shall embrace more than one subject, and that shall be embraced in the title; (2) that due process of law for the taking of such property is not provided by the act; and (3) that the act does not provide for the payment of damages aside from the value of the land taken.

(1) The title of the act is as follows: "An act providing for condemnation proceedings for right-of-way for irrigating ditches, canals, and flumes for agricultural and mining purposes and relating to right of appropriation of water." It is claimed by appellants that this act

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embraces two distinct subjects, which are embraced in the title; one has relation to condemnation proceedings for right of way for ditches and canals, without regard to the source of supply or the manner of acquirement of the water to be used therein; the other is a declaration of rights of persons, engaged in irrigation, to appropriate water from the natural streams and lakes of the state.

Upon an examination of the act, we find that sections 1 and 2 define what persons are entitled to take certain waters for the purposes of irrigation and mining. Section 3 provides that a person, owning lands requiring irrigation and not being a riparian proprietor, shall have a right of way, for purposes of irrigation, through lands intervening between his lands and certain waters. Section 4 defines such right of way. Section 5 provides that, upon the refusal of the owner of intervening lands to permit the passage of water over the same, the persons desiring such right of way shall proceed to condemn and take the right of way. The remainder of the act provides for the procedure. There can be no doubt that a subject embraced in the title of an act includes all subsidiary details which are means for carrying into effect the object and purpose of the act disclosed in that subject. Sutherland, Stat. Constr., § 96 and cases cited; Cooley, Const. Lim. (7th ed.), pp. 205-9. Under this rule, if the title of the act in question had been, "An act relating to the right of appropriation of waters," there can be no doubt that the act, under such title, might have contained all the provisions it now contains, and not have been subject to the criticism of duplicity, for the reason that the provisions relating to the condemnation of rights of way are necessary to carry out the purpose of the act. The fact that the title contains more of a synopsis of the details of the act than is necessary does not make it ob-

noxious to the constitutional provision named, provided the subsidiary details are germane thereto, and necessary to carry the object of the act into effect. The provisions relating to condemnation proceedings are special to this act, and are clearly germane to its object, and necessary to its enforcement. Neither the title, nor the act itself, is duplicitous.

(2) The act is next attacked upon the ground that it does not provide for the taking by due process of law. Section 6 provides that, in case of the refusal of owners of land, through which the ditch is proposed to be made, to allow the passage of the ditch or right of way, the person desiring such right of way shall file in the superior court a complaint, describing the land to be crossed, the size of the ditch, the quantity of land required, the value of the land and damages to the property, setting forth the names of the owners or parties interested in the land to be crossed, and praying that a right of way be granted. It also provides that a summons shall be issued and served as in other cases of a civil nature, and that, in case of default of the defendants, the court shall impanel a jury to determine the value of the land occupied, and the damages. The next section provides that, when the defendant shall appear, he shall allege in his answer the value of the land proposed to be used, and the jury shall thereupon determine the value and the damages. We think the provisions here provide for ample notice. It is true, as stated by appellants, that there is no express provision that the plaintiff shall maintain the requirements of the statute, or the allegations of his complaint, at the trial. But this it seems must follow as a matter of course, whether the defendants appear or not. These are questions for the court. They are jurisdictional to

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the right of the court to enter a decree. The jury determines only the question of damages. This procedure was followed, and we think was sufficient.

(3) Upon the last question, appellants argue that the act does not provide for the payment of damages to lands, aside from the value of the land taken. The provision of the act upon this point is as follows: The jury "shall determine the value of the land occupied by said ditch, canal, or works, and the damages, and, upon the return of the verdict, the court shall enter a decree, directing that the right-of-way for the ditch, canal, or works be established according to the description in the complaint, and that the plaintiff shall pay to the clerk of the court the full amount of the value of the land and damages found by the jury, before the plaintiff shall begin work on said ditch, canal, or works." The word "damages" as here used can refer only to damages to the whole tract in addition to the value of the land actually taken. It is true, this quotation is from section 6, which provides the procedure where the defendants make default; but section 7 provides the same procedure where the defendants appear. It makes no change in this respect.

We conclude that the act is valid upon the points suggested. The judgment is therefore affirmed.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 4869. Decided September 27, 1904.]

CHARLES COOK, as guardian of Joseph Cook, a minor,
Respondent, v. STIMSON MILL COMPANY, Appellant.¹

EVIDENCE—ADMISSIONS OF AGENT—RES GESTAE—INCOMPETENCY OF SERVANT. In an action for personal injuries sustained through the alleged incompetency of the engineer in charge of the defendant's train, the declarations of defendant's superintendent, who was not at the scene of the accident, made the day after, reflecting upon the engineer's competency, are inadmissible and not binding upon the defendant, since they are not part of the *res gestae*.

MASTER AND SERVANT—NEGLIGENCE—RAILROAD WRECK—PROXIMATE CAUSE—LOGGING TRAIN COLLIDING WITH COWS—QUESTION FOR JURY. In an action for personal injuries sustained in a collision of a logging train with cows on the track, upon rounding a curve at the end of a down grade, the questions of plaintiff's contributory negligence and assumption of the risks in riding on the engine, and whether the presence of the cows was the proximate cause of the injury, are for the jury, where the evidence was conflicting as to the competency of the engineer, the sufficiency of the equipment, and as to the negligence of the trainmen in permitting the train to get beyond their control.

Appeal from a judgment of the superior court for Snohomish county, Denny, J., entered July 18, 1903, upon the verdict of a jury rendered in favor of the plaintiff for \$10,000 for personal injuries sustained while riding on a logging engine. Reversed.

Root, Palmer & Brown, for appellant, to the point that the presence of the cows on the track was the proximate cause of the injury, cited: *Berlin Mills Co. v. Croteau*, 88 Fed. 860; *Evansville R. Co. v. Griffin*, 100 Ind. 221; *Harlan v. St. Louis R. Co.*, 65 Mo. 22.

Cooley & Horan, for respondent, contended, among other things, that the admissions of Rowe were admis-

¹Reported in 75 Pac. 39.

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sible as part of the *res gestae*. *Hall v. Union etc. Ins. Co.*, 23 Wash. 610, 63 Pac. 505, 83 Am. St. 844, 51 L. R. A. 288; *Moran Bros. Co. v. Snoqualmie etc. Co.*, 29 Wash. 292, 69 Pac. 759; *Roberts v. Pt. Blakeley Mill Co.*, 30 Wash. 25, 70 Pac. 111. The error, if any, was cured by subsequently admitting testimony which made the admissions competent as impeaching evidence. *Wright v. Stewart*, 19 Wash. 179, 52 Pac. 1020; *Rounsavell v. Pease*, 45 Wis., 506; *Gano v. Chicago etc. R. Co.*, 66 Wis. 1, 27 N. W. 628, 838; *Belmont etc. R. Co. v. Smith*, 74 Ala. 206; *Griffin v. State*, 76 Ala. 29; *East Tenn. etc. R. Co. v. Hesters*, 90 Ga. 11, 15 S. E. 828; *Hess v. Wilcox*, 58 Iowa 380, 10 N. W. 847; *Léebrick v. Stahle*, 68 Iowa 515, 27 N. W. 490; *Roberts v. Woven Wire Mat-tress Co.*, 46 Md. 374; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201; *Laird v. Campbell*, 100 Pa. St. 159.

MOUNT, J.—The minor son of respondent was injured while riding on one of appellant's railway logging trains. On the day of the accident, the young man was riding on the engine, from a place called camp No. 3 to head-quarters camp. The road between these points is somewhat uneven; there is a down grade most of the way, although at places there are level stretches of track. While the train, consisting of the engine and eight loads of logs, was passing over one of these level stretches, a drawhead was broken, and the train was stopped for repairs. When the train was again started, it was necessary to release a number of the brakes on the loaded cars. This was done. The train then started, and soon began going down grade. At the end of this descent there was a short curve. The train ran around this curve, and just beyond collided with two cows, which were upon the track. The collision

caused two wheels of the engine, and two of the loaded cars, to leave the track. The train thereafter ran between six hundred and seven hundred feet, when the engine struck a bank and stopped. At that time the tender was jammed against the engine, so that it caught one of the boy's legs, which was so injured that amputation was necessary. The respondent, as guardian *ad litem*, brought this action to recover damages for injuries to his son.

The negligence alleged was, that the engineer in charge of the train was incompetent; that the equipment of the train was insufficient; and that the persons in charge of the train neglected to set the brakes, and thereby permitted the train to get beyond their control. Upon the trial respondent, over appellant's objection, was permitted to testify to certain statements made to him by James Rowe, appellant's superintendent in charge of the logging business where the accident happened. These statements, if made at all, were made by Rowe in a conversation with respondent, the next day after the accident, while they were riding together to the town of Marysville. The testimony of respondent upon this point was as follows:

"Q. Did you ever have any talk with Mr. Rowe, after this accident occurred, as to how it happened? A. Yes, sir. We had a little talk going to Marysville the next day after the accident, on Sunday, as we were riding to Marysville. Q. You came from headquarters to Marysville with Mr. Rowe? A. Yes, sir, in a buggy, on Sunday. Q. What talk did you have at that time? (Objection as immaterial and not a part of the *res gestae*, and not binding on the company. Question withdrawn.) Q. Did he have anything to say as to the competency of Mr. Jorgenson? A. Yes, sir, he did. Q. The engineer? A. Yes, sir. Q. Now, what was that? (Objection for same

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reasons as above stated. Overruled. Exception.) A. He said, if Mr. John Forney or Mr. Stanton had been on that engine, the wreck wouldn't have occurred. We were speaking about the wreck having occurred. (Motion to strike out this answer as not being responsive to the question. Overruled. Exception.) Q. Did he state why he believed it would not have occurred, if these other engineers had been in charge, or been on the engine? A. Well, no, he didn't say why. He just made that remark, that, if either of them had been on the engine, the wreck probably wouldn't have occurred. Q. Did he say anything particularly about Mr. Jorgenson? A. Well, he said that Mr. Jorgenson had been there long enough to handle an engine as well as anybody. Q. Did he say anything in reference to how he did handle that engine as a matter of fact? A. Well, he said he seemed to be unlucky in going around with engines, or something to that amount."

The object of this evidence, and the effect of it upon the jury, no doubt, was to fix the blame for the accident upon the engineer in charge of the train. It was not claimed that Mr. Rowe was at the scene of the accident at all. In fact, he was in Seattle, many miles distant, at the time the wreck occurred. The rule is settled in this state that declarations of an agent, made after the transaction, cannot bind the principal, unless they are so related as to constitute a part of the *res gestae*. *Wiedeman v. Tacoma R. etc. Co.*, 7 Wash. 517, 35 Pac. 414; *Vicksburg etc. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111; *Lambert v. La Conner etc. Co.*, 30 Wash. 346, 70 Pac. 960. In these two last named cases it was held that the declarations of the agents, made at the scene of the accident, and so nearly contemporaneous with it as to be held in presence of it, were admissible as part of the *res gestae*. But, in the

case at bar, upon no theory can the declaration of the agent be held to be a part of the *res gestae*. For error in the admission of this evidence, the cause must be reversed.

But appellant asks us to reverse the case and order a dismissal upon the grounds, that, conceding the appellant was negligent, the proximate cause of the injury was the cattle upon the track, which was entirely unexpected, and which ordinary prudence could not have guarded against; that the young man assumed the risk; and that he was careless and reckless. These questions are all questions of fact, about which the evidence was very conflicting. They are all of them, therefore, properly for the jury. They were fairly presented to the jury by the instructions given by the court, and, for that reason, we are not required to pass upon any of them.

The judgment is reversed, and the cause remanded for a new trial.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 4949. Decided October 5, 1904.]

CHARLES CHARLTON, *Respondent*, v. S. S. MARKLAND,
Appellant.¹

MALICIOUS PROSECUTION—DEFENSES—MALICE—ADVICE OF COUNSEL. In an action for malicious prosecution a nonsuit should not be granted on the ground that defendant instituted the same upon the advice of the magistrate, where the evidence merely showed that the magistrate stated that the charge was warranted if the facts could be substantiated.

¹Reported in 78 Pac. 132.

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SAME—LACK OF PROBABLE CAUSE—DISCHARGE FOR INSUFFICIENT PROOF. In an action for malicious prosecution, plaintiff's discharge by the magistrate because of insufficient evidence, is *prima facie* proof of want of probable cause.

APPEAL AND ERROR—REVIEW—EVIDENCE OF ADMITTED FACTS. It is not error to exclude evidence of facts which are admitted.

MALICIOUS PROSECUTION—DAMAGES—VERDICT NOT EXCESSIVE. A verdict of \$600 in an action for malicious prosecution will not be disturbed as excessive where the plaintiff was an old man, was greatly humiliated, and lost much sleep, although he was under arrest less than one hour.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered April 10, 1903, upon the verdict of a jury rendered in favor of the plaintiff for \$600 damages for malicious prosecution. Affirmed.

Johnston & Girard (John R. McBride, of counsel), for appellant.

Connor & Hand, for respondent.

MOUNT, J.—This was an action to recover damages for a malicious prosecution. The complaint alleged that the defendant had sworn to a complaint, before a United States court commissioner, charging the plaintiff with having unlawfully cut timber and cord wood from the public lands of the United States, for the purpose of selling said timber and cord wood; that the plaintiff was arrested, tried, and acquitted of said charge; and that the defendant made the charge and caused the arrest of the plaintiff without probable cause, maliciously, for the purpose of annoying and harassing plaintiff and causing him expense and damage. Defendant answered, admitting the proceedings before the United States court commissioner, but denied all the other allegations of the complaint. Upon a trial before a jury a verdict was returned in favor of the plaintiff for \$600. Defendant appeals.

Appellant urges that the court erred in denying a mo-

tion for a nonsuit, first, for the reason that the defendant caused the criminal prosecution upon the advice of the magistrate. In the first place, there is no evidence in the record of the plaintiff's case in chief that the United States court commissioner advised the prosecution. It is true, the court commissioner, when upon the witness stand, testified as follows:

"Q. You say Markland had several interviews with you? A. Yes, sir. Q. Did you attempt to advise him as his attorney in the matter? A. I never did that. I simply stated, I suppose, as I do to others, that if the facts as stated could be substantiated, that I thought he would be warranted in bringing his complaint."

This does not show that the court commissioner advised the bringing of the prosecution. Even if the evidence has a tendency to show that the prosecution was based upon advice of the commissioner, it properly belonged to the defense (*Richardson v. Spangle*, 22 Wash. 14, 60 Pac. 64), and was a question for the jury. *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697.

Second, that the plaintiff's proof fails to show want of probable cause. There was evidence to the effect that the wood cut by respondent was cut from a mining claim in possession of a third party, and was used by respondent for domestic purposes; that, a few days before the respondent was arrested, he and appellant had some difficulty over another mining claim, and the appellant thereupon, after using much abusive language, threatened to have the respondent arrested; that, upon the trial of the criminal case before the commissioner, respondent was discharged, for the reason that there was not "sufficient evidence or cause to believe him guilty." This court, in *Noblett v. Bartsch*, 31 Wash. 24, 71 Pac. 551, 96 Am. St. 886, adopted the rule that "the showing of a discharge

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by the committing magistrate is evidence of want of probable cause, sufficient to make a *prima facie* case, but does not shift the burden of proof." Under this rule, the court did not err in submitting the case to the jury.

The appellant alleges error of the court in excluding the evidence of two witnesses, called by appellant for the purpose of showing what the records of the United States land office at Spokane contained, and also to prove a rule of the secretary of the interior. But the facts sought from these witnesses were admitted by the respondent, and, for that reason, there could be no error in the ruling of the court.

Appellant argues that the verdict is excessive. It is true that respondent was under arrest and in charge of an officer but a short time, probably less than one hour. But the evidence shows that the respondent is an old man, and that the accusation of crime and arrest greatly humiliated him, and caused him much loss of sleep, and some grief, which seemed to weigh upon him. Under these circumstances, the verdict of \$600 is not so large as to justify us in interfering with it.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR and ANDERS, JJ., concur.

[No. 5355. Decided October 5, 1904.]

THE STATE OF WASHINGTON, *on the Relation of Chris
Klein, Plaintiff, v. THE SUPERIOR COURT FOR
KING COUNTY, Defendant.*¹

APPEAL AND ERROR—STATEMENT OF FACTS—CORRECTION BY SUPPLEMENTAL STATEMENT—MANDATE. Where a statement of facts certified by the trial court to the supreme court is not complete, essential matters having been omitted, it may, under Bal. Code § 5060, be corrected by a supplemental statement in accordance with the facts, at any time before the hearing of the appeal, and the trial court will be required by mandate to certify such supplemental statement.

Application to the supreme court, filed September 30, 1904, for a writ of mandate to compel the superior court for King county, Bell, J., to certify to a supplemental statement of facts. Writ granted.

W. T. Scott and Charles S. Gleason, for relator.

Frank S. Griffith, for defendant.

DUNBAR, J.—This is an application for an order directing and requiring Hon. W. R. Bell, judge of the superior court of the state of Washington in and for King county, to certify to this court a supplemental statement of facts in the above entitled cause, certifying and showing all matters and things that took place and occurred in and at the trial of the above entitled cause, in said superior court of the state of Washington in and for King county, with reference to the alleged misconduct of the jury which tried said cause, and with reference to the hearing and overruling of appellant's motion for a new trial, filed and heard in said superior court in said cause, which are not set forth and certified in the appel-

¹Reported in 78 Pac. 137.

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lant's bill of exceptions and statement of facts, now on file in the above entitled cause; and, particularly, all affidavits filed by the above named respondent in opposition to appellant's motion for a new trial, and read to, and considered by, said superior court in deciding said appellant's motion for a new trial.

The affidavits in support of this motion are, in substance, to the effect that one of the grounds for new trial relied upon by the appellant was misconduct of the jury. Certain affidavits were offered in aid of said motion for new trial, and answering affidavits were made thereto by the respondent, denying the misconduct of the jury. The judge who tried the cause makes affidavit that all of these affidavits, both of the respondent and the appellant, were read and considered by him in determining the motion for a new trial, but that, through mistake and inadvertence, the affidavits contravening the affidavits filed on behalf of appellant were not incorporated in the statement of facts. Upon the application of the respondent to the court to certify to all the facts, the judge refused to so certify, on the ground that the superior court had lost jurisdiction of the cause, the same having been appealed to this court; but announced that the supplemental statement of facts, the certification of which was asked for by respondent, was a statement of facts in accordance with the facts as they actually occurred.

It seems to us that this case falls squarely within the provisions of § 5060, Bal. Code, which specially provides that the judge may correct or supplement his certificate according to the fact, at any time before an appeal is heard; and further provides that, if the judge refuse to settle or certify a bill of exceptions or statement of facts, or to correct or supplement his certificate thereto, in a proper case, he may be compelled so to do by a man-

date issued out of the supreme court, either pending an appeal or prior thereto. It appears that, in some of the cases heretofore decided by this court, this provision of the statute has not been enforced, but it was because it was not called to the attention of the court in the determination of those causes. But the statute is certainly plain and explicit, and seems to have been enacted to meet just such a case as the one that is presented here. It is conceded that the statement on appeal is not the correct statement, and is not one upon which this court could properly review the action or discretion of the lower court in passing upon the motion for a new trial. The application is made before the appeal is heard, and, falling within the plain provisions of the statute, the motion must be sustained, and respondent will be awarded the relief asked for.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

[No. 5014. Decided October 5, 1904.]

DEER TRAIL CONSOLIDATED MINING COMPANY *et al.*, *Respondents*, v. MARYLAND CASUALTY COMPANY OF BALTIMORE, Md., *Appellant*.¹

INDEMNITY—EMPLOYER'S LIABILITY INSURANCE—POLICY REQUIRING IMMEDIATE NOTICE OF ACCIDENT—DELAY—INSUFFICIENT EXCUSE. Where a policy of insurance indemnifying an employer against liability to servants provides for immediate notice of the accident, a delay of eight months in giving the notice vitiates the policy, and the delay is not excused by the fact that one of the assured parties did not know of the accident, and the other did not know of the existence of the policy.

SAME—WAIVER OF NOTICE OF ACCIDENT—EVIDENCE OF WAIVER—SUFFICIENCY. Waiver of a provision in an employer's liability

¹Reported in 78 Pac 135.

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Citations of Counsel.

policy of insurance requiring immediate notice of the accident is not shown by evidence to the effect that the attorneys for the assured called on the general agents of the company eight months after the accident, and in answer to inquiries stated that no notice had been given because they had had no previous notice of the accident (one of the assured having had notice of the accident but not of the policy), and that thereupon the agents stated that, if so, notice would have been impossible, and that notice must be furnished as soon as possible, that a time was mentioned, which the agents said would be soon enough, and later furnished blanks for the purpose, which were filled up and delivered to the agents.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered August 3, 1903, upon the verdict of a jury rendered in favor of the plaintiff in an action upon an employer's liability insurance policy. Reversed.

Danson & Huneke, for appellant.

Tolman & Kimball and *Happy & Hindman*, for respondents, contended, among other things, that forfeitures are not favored and courts are prompt to seize hold of any circumstances indicating a waiver by the company. *Fraisier v. New Zealand Ins. Co.*, 39 Ore. 342, 64 Pac. 814; *Hollis v. State Ins. Co.*, 65 Iowa 454, 21 N. W. 774; *Insurance Co. v. Eggleston*, 96 U. S. 577; *Insurance Co. v. Norton*, 96 U. S. 239; *Hudson v. Northern Pac. R. Co.*, 92 Iowa 231, 60 N. W. 608, 54 Am. St. 550. Any act inconsistent with an intent to rely on the forfeiture is sufficient. *Phoenix Mutual Life Ins. Co. v. Doster*, 106 U. S. 30, 1 Sup. Ct. 18; *Lyon v. Traveler's Ins. Co.*, 55 Mich. 141, 20 N. W. 829, 54 Am. St. 354; *Dibbrell v. Georgia etc. Ins. Co.*, 110 N. C. 193, 14 S. E. 786, 28 Am. St. 678; *Trippe v. Provident etc. Soc.*, 140 N. Y. 23, 35 N. E. 316, 37 Am. St. 529; *Dwelling-House Ins. Co. v. Dowdall*, 159 Ill. 179, 42 N. E. 606;

Mix v. Royal Ins. Co., 169 Pa. St. 639, 32 Atl. 460; *Kingman v. Lancashire Ins. Co.*, 54 S. C. 599, 32 S. E. 762; *New York Life Ins. Co. v. Baker*, 83 Fed. 647; *Smith v. St. Paul etc. Ins. Co.*, 3 Dakota 80, 13 N. W. 355. Demanding proof of loss waives the breach. 16 Am. & Eng. Ency. Law, 941, and cases cited. Waiver may be made by such acts after the time has elapsed. *Union etc. Co. v. Mondy* (Colo.), 71 Pac. 680; *Goodwin v. Mass. etc. Ins. Co.*, 73 N. Y. 480; *Shelden v. National etc. Asso.*, 122 Mich. 403, 81 N. W. 266; *Moore v. Wildey etc. Co.*, 176 Mass. 418, 57 N. E. 673; *Searle v. Dwelling-House Ins. Co.*, 152 Mass. 263, 25 N. E. 290. The contract is to be construed under the rules applicable to other insurance policies, and most strongly against the company. *Remington v. Fidelity etc. Co.*, 27 Wash. 429, 67 Pac. 992. The question of whether notice was given immediately is a question of fact for the jury, under all the circumstances surrounding this particular transaction. *Munz v. Standard etc. Ins. Co.*, 26 Utah 69, 72 Pac. 182; *Horsfall v. Pacific etc. Ins. Co.*, 32 Wash. 132, 72 Pac. 1028; *Woodmen's Acc. Asso. v. Byers*, 62 Neb. 673, 87 N. W. 546, 89 Am. St. 777; *Carey v. Farmer's Ins. Co.*, 27 Ore. 146, 10 Pac. 91; *Remington v. Fidelity etc. Co.*, *supra*; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *People's Acc. Asso. v. Smith*, 126 Pa. St. 317, 17 Atl. 605, 12 Am. St. 870; *Kentzler v. American etc. Asso.*, 88 Wis. 589, 60 N. W. 1002, 43 Am. St. 934. The respondent Deer Trail Consolidated Mining Company had no knowledge of the accident, and this would excuse that company from giving notice. *McElroy v. John Hancock etc. Ins. Co.*, 88 Md. 137, 41 Atl. 112, 71 Am. St. 400; *Phillips v. United States etc. Soc.*, 120 Mich. 142, 79 N. W. 1; *Trippe v. Provident etc. Soc.*, *supra*. And the Yarwoods had no

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notice or knowledge of the issuance of the insurance policy, and they were also excused. *Konrad v. Union etc. Co.*, 49 La. Ann. 636, 21 South. 721.

MOUNT, J.—In the years 1900 and 1901 the respondents were the owners of certain mines in Lincoln county, Washington. The respondents Yarwood brothers were operating these mines, and the net proceeds thereof were divided equally between the Yarwood brothers and the Deer Trail Consolidated Mining Company. On March 20, 1900, the Deer Trail Consolidated Mining Company applied to the appellant for an indemnity insurance contract in favor of itself and the Yarwood brothers. This contract was issued by appellant in favor of the respondents, indemnifying them, for the period of one year, against loss from statutory and common law liability for damages on account of bodily injury suffered by any employee of the assured. It was delivered to the Deer Trail Consolidated Mining Company, and the premium paid. The Yarwood brothers were not informed, and did not know, of the contract of insurance.

On the 19th day of May, 1900, one Nels Johnson, while in the employ of respondents, and while performing his duty as such employee, was injured through the negligence of respondents. W. J. Yarwood was general manager of the mines at the time of the injury, but he did not know of the injury, and did not hear thereof for several days after it had happened. When he heard of it, he went to Johnson and asked him if he was hurt. Johnson replied: "My thumb is sore yet, but I will get to work in a day or two." A few days after this Johnson went to work in the mine, and continued to work until the mine closed down in September following. During the time he was working he made no complaint on account of

being injured. Yarwood did not know of the existence of the policy of insurance, and did not notify the Deer Trail Consolidated Mining Company of the accident.

In January, 1901, Johnson commenced an action against respondents to recover damages for his injuries. This was the first time he had made any claim for his injuries. The complaint was served on the Deer Trail Consolidated Mining Company on January 22, 1901. On the same day, P. A. Daggett & Co., the local agents of the appellant, were notified of the action, and requested to defend the same, which they refused to do. The respondents thereupon defended the action, and subsequently a judgment was rendered against them, in favor of Johnson, for \$1,717.60. Respondents paid this judgment in favor of Johnson, and also paid costs of defending the action, amounting to \$268.85, in addition to the amount of the judgment named. Respondents thereupon brought this action against appellant upon the contract of insurance.

The complaint sets out a copy of the policy, alleges its execution and delivery on March 20, 1900, and the payment of the premium. It alleges the injury to Johnson on May 19, 1900, while he was in the employ of respondents; that the injury was not known to the Deer Trail Consolidated Mining Company until January 21, 1901, and that Yarwood did not know of the insurance until January 22, 1901; that respondents did not know that Johnson intended to make any claim for damages until that time; that Johnson, on January 21, 1901, commenced an action for \$2,000 damages against respondents; that thereupon respondents notified appellant thereof, and that appellant thereupon agreed to, and did, extend the time for giving notice of the accident to January 28, 1901, and furnished blanks to respondents for that purpose; that, relying upon this extension of time, respondents, at great

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trouble and an expense of \$50, gave a written notice to appellant on January 28, 1901. The complaint also alleges that Daggett & Co. are the general agents of the appellant, authorized to issue and settle policies of insurance, and that, knowing the facts, they extended the time for giving notice of the accident, and authorized the attorneys for the appellant to appear in the action of Johnson v. Yarwood Brothers and the Deer Trail Consolidated Mining Company; and that said attorneys thereupon did appear in said cause, and filed a motion requiring said Johnson to give a bond as security for costs; that thereafter appellant refused to proceed further in said case. The complaint then alleges that Johnson obtained a judgment against respondents, and the payment thereof. The appellant appeared, and demurred to the complaint. This demurrer was overruled; whereupon appellant filed an answer, denying any liability under the policy of insurance. Upon a trial of the cause to a court and jury, a verdict was returned for the full amount claimed, and judgment was entered upon the verdict.

Appellant defended the action in the lower court upon the ground that no notice had been given of the accident, according to the terms of the policy, and that there had been no waiver of the notice. Upon this appeal they rely on the same points. The contract sued on provides, among other things, as follows:

"This insurance is subject to the following conditions, which are to be construed as conditions precedent of this contract: 1. The assured, upon the occurrence of an accident, shall give immediate notice thereof in writing with the full particulars to the home office of the company at Baltimore, Md., or to its duly authorized agent. . . . 10. An agent has no authority to change this policy or to waive any of its provisions, nor shall notice to any agent or knowledge of his or of any other person be held to effect

a waiver or change in this contract, or in any part of it. No change whatever in this policy nor waiver of any of its provisions shall be valid unless an endorsement is added hereto, signed by the president or secretary of the company, at its home office, expressing such waiver or change."

It is conceded that the accident occurred on May 19, 1900, and that no notice thereof was given to the appellant until January 21, 1901. The excuse offered in the complaint, and by the witnesses, for this failure to give notice, was that the Yarwood brothers, who had charge of the mine and the men working therein, had no knowledge or notice of the policy. The Deer Trail Consolidated Mining Company, which procured the policy, had no notice of the accident. This condition of affairs was brought about solely by the neglect of one of the insured to notify the others of the contract, and, as a matter of course, is no excuse for failure to notify the appellant of the accident according to the terms of the policy. This court has heretofore held that "immediate notice," in policies of this kind, means notice within a reasonable time. *Remington v. Fidelity & Deposit Co.*, 27 Wash. 429, 67 Pac. 989; *Kleebe v. Long-Bell Lumber Co.*, 27 Wash. 648; 68 Pac. 202; *Horsfall v. Pacific etc. Ins. Co.*, 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425. Under this rule we think the lower court properly held that eight months was not within a reasonable time, and that respondents did not comply with this requirement of the policy, which was a reasonable one for appellant's protection and benefit.

The respondent's evidence upon the question of the waiver of the notice was given by Mr. Kimball, one of respondents' attorneys, and is as follows:

"I went to the office of P. A. Daggett & Co., general managers of the Maryland Casualty Company, taking the complaint with me. In the meantime I had looked up the

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number of the policies which the Deer Trail Consolidated Mining Company held, and I went down to report to them that we had been sued upon an accident policy, which was alleged to have happened in May previous, and we took the complaint and went over it, and looked up the dates and descriptions, and Mr. Daggett asked me if any proof of this accident had been sent in, and I told him not to my knowledge had there been any sent in. . . . As I say, I told Mr. Daggett to the best of my knowledge there had been no proof of this accident furnished this company, and there was no papers in my possession, or in Mr. Tolman's possession as general manager, speaking of any accident of this kind; that it was absolutely unknown in our office, and that this was the first advice or knowledge of the accident that had been brought to our knowledge, and Mr. Daggett made this statement: 'Well, if you didn't know about it you couldn't very well make a report of the accident, and we must get in a report as soon as possible.' . . . We took the complaint and went over it carefully as to the dates and everything else, so as to acquaint ourselves as best we could of the nature of the claim, and the history of the injury, as alleged by Mr. Johnson. . . . Mr. Daggett stated that Messrs. Danson & Huneke were attorneys for the company, and that they would defend the action, and told me I had better see them and acquaint them with the facts. I left the complaint with P. A. Daggett & Co., and the next morning I went to the office of Danson & Huneke and found the complaint in their possession. . . . As I stated a moment ago, Mr. Daggett said: 'You could not very well make proof of the accident without knowing about it, and we must get in proof as soon as possible,' and he asked me when I could furnish proof, and I said that we would have to correspond with the people at the mine, and then I told him that Mr. Leyson, the foreman and superintendent, would be down here on the 28th or 29th of January, and that I would write to him at once, and have him ascertain all the facts so that we could make out proof of the accident at the time, and he says, 'Very well, that will be soon enough.'"

The testimony of this same witness shows that subsequently, on the 28th day of January, he notified Mr. Daggett that Mr. Leyson had come to Spokane, and that thereupon Mr. Daggett went to Mr. Kimball's office with blanks, which were filled out upon information furnished by Mr. Leyson, and that Mr. Daggett took a copy away with him. This is all the evidence on the part of the respondents to show a waiver of the provision for immediate notice of an accident. Mr. Daggett, for the appellant, denied the statements attributed to him.

Before the cause was submitted to the jury, the appellant moved the court for a directed verdict, upon the ground that the evidence of the respondents failed to show a waiver. This motion should have been granted. Assuming that the evidence given by Mr. Kimball was true, it was clearly insufficient to show a waiver on the part of the company. The statement of Mr. Daggett, "Very well, that will be soon enough," when taken in connection with the rest of the conversation, cannot be reasonably interpreted to mean that the company thereby waived its right to have notice of the accident within a reasonable time after it had happened. What he said clearly meant that, if the proof or statement of Mr. Leyson were furnished by the 28th or 29th, it would do as well then as at the date of the conversation, which was on January 22. Eight months had already expired since the accident, without any reasonable excuse for not complying with the terms of the policy. It was too late, on January 22, to give the notice. The respondents were then in default. The conversation with Daggett, even if relied upon, caused no injury to the respondents which they had not already suffered. We think there is nothing in this evidence to show any intent to waive the time for giving the notice, or to

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waive any right of the company under the policy. If the respondents had actually made out their notice of the accident and handed it to Mr. Daggett, the agent of the company on January 22, 1901, the fact that he received the notice for the company would certainly not be held to be a waiver of the right of the company to defend against the policy upon the ground that notice had not been given within a reasonable time. The most that can be claimed for the evidence above set out is that notice of the accident was given to the company on January 22, the date of the conversation. The lower court rightfully held that this did not comply with the requirements of the policy. He should have held, also, that the evidence failed to show a waiver of the time for notice of the accident.

The judgment is therefore reversed, with instructions to dismiss the action.

FULLERTON, C. J., and HADLEY and ANDERS, JJ., concur.

[No. 5165. Decided October 10, 1904.]

ISAAC M. CURTIS, *Respondent*, v. OREGON RAILROAD AND
NAVIGATION COMPANY, *Appellant*.¹

RAILROADS—CROSSINGS—KILLING STOCK ON TRACK—WANTON
NEGLECT—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.
In an action for the negligent and wanton killing of stock upon a
railroad crossing, there was sufficient evidence to require the
questions of negligence and wantonness and contributory negli-
gence to be submitted to the jury, where it appears that the plain-
tiff and an assistant were driving a band of eighty-six cattle
across defendant's railroad tracks at a point where grade ap-
proaches were made and gates maintained after the filling in of a
trestle (one gate being five hundred feet down the track from the
other), that the plaintiff thought the train had gone by and looked

¹Reported in 78 Pac. 133.

and saw no train before opening the gates; that when the cattle were in the act of crossing the track, a passenger train came around a curve 1950 feet distant, at a high rate of speed, and no whistle was sounded, and no bell was rung until just before striking the cattle, after which the train ran two hundred yards before stopping, although there was a direct conflict as to the distance and the ability of the men to stop the train.

RAILROADS—LICENSEE OR TRESPASSER ON TRACK—PRIVATE CROSSING—EVIDENCE—SUFFICIENCY. In an action for the killing of stock upon a railroad track, it is a question for the jury whether the plaintiff was a trespasser, or licensee, where it appears that the track was originally built on a trestle, that a private crossing under the trestle was used for a long time, that, upon filling in the trestle, grade approaches were built and gates maintained, and used for crossing the track, and the plaintiff was driving a band of cattle through the gates and across the track at such point at the time they were struck.

SAME—DUTY TO LICENSEE AND TRESPASSER. In the case of a licensee upon a railroad track, the duty of the company is to exercise reasonable care in looking out for and avoiding injury to him; and in the case of a trespasser, the duty is to use reasonable care after discovering his presence, without any duty to be on the lookout.

RAILROADS—CROSSINGS—WANTON NEGLECT—TRIAL—SPECIAL VERDICT. In an action for the killing of stock upon the track through the alleged wanton neglect of the trainmen, a special verdict, to the effect that the engineer did not make every effort in his power to stop the train as soon as he saw the cattle, amounts to a finding of wanton neglect, and sustains a general verdict for the plaintiff.

DAMAGES—EXCESSIVE—AMOUNT ADMITTED. The defendant can not claim that damages for stock killed are excessive, where the amount found was the sum admitted in its answer.

Appeal from a judgment of the superior court for Whitman county, Chadwick J., entered December 19, 1903, upon the verdict of a jury rendered in favor of the plaintiff for \$620 damages for stock killed at a railroad crossing. Affirmed.

W. W. Cotton, M'Crosky & Canfield, and *Lester S. Wilson*, for appellant. The plaintiff was guilty of contributory

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negligence in driving a large band of cattle down the track five hundred feet to make this crossing without keeping a lookout for the train which was then due. *Ohio etc. R. Co. v. Eaves*, 42 Ill. 288; *Dickey v. Northern Pac. R. Co.*, 19 Wash. 350, 53 Pac. 347; *Haner v. Northern Pac. R. Co.*, 7 Idaho 305, 62 Pac. 1028; *McGill v. Minneapolis etc. R. Co.*, 113 Iowa 358, 85 N. W. 620; *Palmer v. Northern Pac. R. Co.*, 37 Minn. 223, 33 N. W. 707, 5 Am. St. 839; *East Tenn. etc. R. Co. v. Watters*, 77 Ga. 69; *Union Pac. R. Co. v. Hutchinson*, 39 Kan. 485, 18 Pac. 705; *Hanna v. Terra Haute etc. R. Co.*, 119 Ind. 316, 21 N. E. 903; *Nolan v. Central R. Co.*, 67 N. J. L. 124, 50 Atl. 348; *Forbes v. Atlantic etc. R. Co.*, 76 N. C. 454; *Fisher v. Farmer's Loan etc. Co.*, 21 Wis. 74; *Cleveland etc. R. Co. v. Ducharme*, 49 Ill. App. 520; *Young v. Hannibal etc. R. Co.*, 79 Mo. 341; *Smith v. Chicago etc. R. Co.*, 34 Iowa 508. The jury had no right to disregard the uncontradicted evidence that the engineer used all means in his power to stop the train. *Pennsylvania R. Co. v. Davis*, 4 Ind. App. 51, 29 N. E. 425; *Indianapolis etc. R. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. 578; *St. Louis etc. R. Co. v. Adams*, 24 Tex. Civ. App. 231, 58 S. W. 1035. There was no evidence of an act amounting to wanton neglect. *Huff v. Chicago etc. R. Co.*, 24 Ind. App. 492, 56 N. E. 932, 79 Am. St. 274; *Matson v. Port Townsend etc. R. Co.*, 9 Wash. 449, 37 Pac. 705; *Louisville etc. R. Co. v. Anchors*, 114 Ala. 492, 22 South. 279, 62 Am. St. 116.

John Pattison, for respondent.

HADLEY, J.—Respondent brought this suit to recover damages on account of the killing of his cattle by a train upon appellant's railroad. The complaint alleges that,

while respondent was driving a band of cattle across the railroad track, the appellant, in the operation of a train of cars, negligently struck the cattle, killing eight head and wounding six others. It is also averred that the persons operating the train could have stopped it, or slackened its speed, so as to have permitted the cattle to be driven off the track without injury; but that, in total disregard of respondent's rights, they, in a reckless, wanton, and malicious manner, struck and killed the cattle. The damages are laid in the complaint at \$620.20. The answer denies that appellant was negligent, and affirmatively pleads contributory negligence on respondent's part. The cause was tried before the court and a jury, resulting in a verdict for respondent in the sum of \$300. Appellant's motion for a new trial was denied, and judgment was entered for the amount of the verdict. This appeal is from the judgment.

There are no errors assigned upon the introduction of evidence or the instructions of the court. The appeal is submitted upon two propositions only: (1) That appellant's motion for nonsuit, or for a peremptory instruction in its favor, should have been granted; (2) that a new trial should have been granted. These questions are discussed together by counsel, and involve the sufficiency of the evidence only.

Briefly stated, the following, together with other testimony, was before the jury, when the motion for nonsuit was made: That respondent and an assistant were driving a band of eighty-six cattle, upon and across the railway track and right of way; that the right of way was fenced at said place, but there was a gate opening through the north fence and, at a distance of about five hundred feet below, another gate opened through the south fence; that the railway track at said place was originally built

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upon a trestle, and that a private crossing under the trestle had been for a long time used there; that, some time before this accident, the railway company filled the trestle with earth, making an elevated embankment grade at said point, and, at the same time, made a grade from the side thereof and where this road had formerly been, so as to form an approach and crossing over the track; that said gates, and the new graded crossing, had been often used for crossing the track and right of way; that respondent believed it was after train time, and that the train had gone along, but that he first looked to see if any train was approaching, and, seeing none, opened each of said gates, and then drove the cattle through the north gate; that, when the cattle were in the act of crossing the track, a passenger train was discovered approaching from the east at a great rate of speed, which ran into the cattle before anything could be done in the way of removing them from the track; that no whistle was sounded, and the bell was rung but two or three times, just as the engine struck the cattle; that, for a distance of nineteen hundred and fifty feet up the track, in the direction from which the train came, one could stand in the middle of the track and see the rails where the cattle were crossing; that the train ran two hundred yards after it struck the cattle before it stopped.

We think the above evidence was such as justified the court in denying the motion for nonsuit. Even if respondent was a trespasser at the time, there was sufficient evidence to warrant submitting to the jury the question whether appellant's train operators saw the cattle in time to have stopped the train, and whether there was reckless and wanton neglect on the part of appellant's employees. The evidence concerning the maintaining of the gates by appellant, its construction of the grade crossing, and the

frequent use thereof by respondent and others, was also such as left it for the jury to say whether these were maintained by appellant and used for the purposes of a crossing with its permission; and, if they should so find, it was also for them to find whether the employees of appellant, in the exercise of proper care as to looking out for persons or animals crossing at said place, should have discovered the cattle in time to have avoided the injury. The testimony as to the crossing and its use, tending as it did to show that respondent was there by license, was also such as made it improper to say, as a matter of law, that he was guilty of contributory negligence, and that question also became one for the jury. It is true, appellant denies the truth of some of the above mentioned material testimony, but, upon the motion for nonsuit, it was the duty of the court to regard all the testimony then before the jury, and so considering it, we believe the motion for nonsuit was in all particulars properly denied.

The testimony introduced by appellant in some important particulars contradicted that of respondent's witnesses, particularly as to the distance from the crossing where the engineer could have seen the cattle. It was testified that, within the distance stated by respondent's witnesses, there was a curve in the track, and also a cut in the road bed, which obstructed the view of the track at the crossing until the train was within a few hundred feet of the crossing. The engineer testified that the train was within two hundred or three hundred feet of the cattle when he first discovered them; that the fireman first saw them and hallooed, "Look out; stock on the track;" that he immediately reversed the engine and applied the air brake and the emergency; that the curve in the track and the bell, sand box, and smoke stack on the engine pre-

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vented him from sooner seeing the cattle; that he could have stopped the train within seven hundred or eight hundred feet; that the train ran about three hundred and fifty or four hundred feet after it struck the cattle before it stopped. It will thus be seen that there was decided conflict in the evidence as to the distance the cattle could have been seen from the direction the train came; but it was for the jury to determine what was the truth, after weighing the conflicting testimony.

Appellant argues that respondent was not a licensee, but, as already indicated, the testimony was such that we think the court should not have held, as a matter of law, that he was not such. Considering that appellant maintained the gates at that place, the former use of the road under the trestle, the construction of a grade approach for a crossing after the trestle was filled, and its subsequent frequent use, it certainly should not be said, as a matter of law, that respondent was there without permission. If he was a licensee at said place, then the duty rested upon appellant to exercise reasonable care in looking out for persons and animals crossing there, and also reasonable care to avoid injury after discovery. If he was a trespasser, then no duty rested upon the appellant to be upon the lookout for him. But as soon as his actual presence was discovered, the duty at once arose to exercise reasonable care to avoid injury. The distinction in the measure of duty between the case of a licensee and that of a trespasser is discussed in *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 Pac. 526. The general principles and authorities cited and discussed there are applicable here. It was said that the appellant in that case was at least no more than an implied licensee, as the railroad company had affirmatively done nothing indicating its consent for

him to walk upon the trestle in the mountains. It was held that in such case no duty rested upon the company to keep the trestle in repair, so as to be safe for pedestrians, and that he must have taken the situation as he found it. In the case at bar, however, there is much testimony of positive acts of appellant tending to show that it prepared the grade and gates for the purpose of permitting others to cross its right of way and tracks; thus making it peculiarly a question for the jury in this case whether respondent was there under the rights created by a license, which had been purposely and intentionally extended to the public to cross at that place. In the case cited, however, it was recognized that the company can not be permitted, by the operation of a train, to wantonly injure a pedestrian upon the trestle, whether he be a licensee or trespasser. So, in this case, the element of wantonness, as we have seen, is involved. The following special interrogatory was submitted to the jury: "Did the engineer make every effort in his power to stop the train as soon as he knew the cattle were on the track?" The jury answered "No" to the above. The special verdict amounts to a finding of wanton neglect, and sustains the general verdict under any view of the case herein discussed. The general principle that questions of negligence and contributory negligence, under conflicting testimony of the character shown in this case, should be submitted to the jury, and that the verdict—unless clearly against the weight of the evidence—should stand, has been so often held by this court that we do not deem it necessary to cite the decisions upon that subject.

Appellant complains that the amount of the verdict is not supported by the evidence. The evidence of respondent showed much greater damages than the jury found, but the amount found was the exact sum which appellant in its

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Syllabus.

answer admitted the damage to be. It is, therefore, not in position to complain

The new trial was properly denied, and the judgment is affirmed.

DUNBAR, ANDERS, and MOUNT, JJ., concur.

FULLERTON, C. J., concurs in the result.

[No. 5159. Decided October 14, 1904.]

JOHN THAYER *et al.*, *Appellants*, v. SPOKANE COUNTY,
Respondent.¹

BOUNDARIES—GOVERNMENT SURVEYS—MONUMENTS—FIELD NOTES—LOCATION OF CORNER. Upon a dispute as to the true location of a section corner the actual location of the government monument controls the field notes, in case of discrepancy, if shown by clear and convincing proof.

SAME—EVIDENCE OF LOCATION—SUFFICIENCY. Where three surveyors locate one of the witness trees and identify the location of a section corner, one of them finding the stake set in 1883, the evidence is sufficiently clear and convincing to sustain the finding of the trial court, who heard and saw all the witnesses, that such was the true location, although there was testimony of the adverse party and others not surveyors to the effect that such location did not coincide with the field notes, and that they found the true stake at the proper location, especially in view of acquiescence in the location found, mutilation of the witness tree, admissions, and other corroborating circumstances.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. A new trial on the ground of newly discovered evidence is properly denied where the affidavits fail to show diligence to obtain the suggested evidence, and which is cumulative or of a disputed character.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 27, 1903, upon the

¹Reported in 78 Pac. 200.

findings and decisions of the court, after a trial on the merits, a jury being waived, in an action of ejectment. Affirmed.

W. J. Thayer, for appellants.

Horace Kimball and Miles Poindexter, for respondent.

HADLEY, J.—Appellants brought this action against Spokane county, and alleged that on the 1st day of March, 1896, they were seized and possessed of a certain described eighty-acre tract of land, in said county; that about said date the county, without their consent, forcibly entered upon, and took possession of, a strip of land forty feet in width, extending across the aforesaid tract, which strip is now known as the “extension of the Rutherford road;” that said county has ever since had said strip without consent of appellants. Damage to the land in the sum of \$120 is alleged, and judgment is prayed for said sum, together with judgment awarding the possession of said strip to appellants. An injunction against the county is also sought to prevent the continuance of the acts charged.

The county answered, denying the material allegations of the complaint, and alleged, affirmatively, the due establishment of a highway upon said strip of land, on the 6th day of September, 1895; that the then owner of the land consented to the establishment of the road, and waived all claims for damages. It appears that the legal title to the land was then in the Northern Pacific Railroad Company, but appellants claimed some interest therein. It is further averred that, immediately after the establishment of the road, it was opened for travel, and has ever since been traveled by the public, and kept open at public expense. The cause was tried before the court, without a jury, the jury being waived, and judgment was

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entered dismissing the action, and awarding costs to the county. The plaintiffs have appealed.

The principal errors assigned are based upon the court's findings. It is claimed that the court erred in finding that the true northeast corner of the northwest quarter of the section is at the point where respondent's witnesses claimed it to be, and not at a point eighty feet west thereof, as claimed by appellants. If the corner was located by the government surveyors where the county contends they located it, then under no view of the case is the road upon appellants' land. The actual point of establishment must govern, without regard to what the field notes may say, if its location is shown by clear and convincing proof. *Cadeau v. Elliott*, 7 Wash. 205, 34 Pac. 916.

The testimony in behalf of appellants consists of their own, and that of some others, who say they have seen a stake at the point for which they contend. Appellants also claim to have measured the distance from the northeast corner of the section to a point on the north section line, about forty chains west from the northeast corner, near which point they say they found a stake having the appearance and marks of a government stake. Neither the appellant, who made the measurement, nor his assistant, was a surveyor, and they used an ordinary chain, measuring along a fence, which they assumed to be upon and following the section line. Appellants, therefore, contend that they, and their witnesses, have actually seen the stake at its original location, and that they are also sustained by the government field notes, which indicate the location of the post as being 39.84 chains west of the aforesaid northeast corner. Appellants also testified that trees, substantially corresponding with monuments described in the field notes, were there when they first saw the stake at this location, but that they are not there now.

Surveyors testified, in behalf of respondent, that they have seen the stake and located the corner at the point where the county contends it was originally placed. The surveyor who laid out the county road found the stake there, and also found one of the witness trees, the marks having been made by a surveyor's scroll. The other witness tree was gone. He testified that the marks upon the stake and tree were very old, and that there was much undergrowth surrounding the stake, indicating that it had not been disturbed for a good many years. Another surveyor, at another time, searched for the corner, and, while he did not find the stake discovered by the other witnesses, he did find the witness tree, and located the corner within a few feet of the stake found by the other witness. He also discovered that some of the marks on the tree had been cut off, but the mark of the scroll was still to be seen. Still another surveyor made an independent examination for the corner, and discovered the same witness tree found by the other two; also, the remains of old trees lying on the ground, in the direction of the other bearing tree, as the direction is indicated by the field notes.

The original survey was made in 1883. Appellants admit that what looked like a government stake stood from 1890 until 1895 at the point which all the surveyors substantially agree is the true corner, but they contend that it was a spurious stake. We think the evidence fails to show that the stake was not there prior to 1890. It is true, the fact as to the true original location is to be determined from any satisfactory and convincing evidence. The testimony of others may be as convincing as that of surveyors, and it is not a matter to be proven merely by the testimony of experts. The weight of each witness' testimony must depend upon his opportunity for knowl-

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edge about the subject, controlled to some extent by his appearance as to candor and truthfulness, and also by his interest in the subject matter. However, from the well known experience of surveyors in such matters, it is not unreasonable that the trial court may have attached much weight to their testimony in this case.

Appellants contend that the field notes' measurement from the northeast corner supports their claim, and should be taken as conclusive, but it is a well established principle, and we have already observed, that the actual location controls, independent of the field notes, if that location is determined by other convincing testimony to differ from the one indicated in the field notes. This rule is admitted by appellants, but they contend that the proofs, submitted by respondent in this case, are not clear and convincing, and that the circumstance that the distance mentioned in the field notes comes substantially to the location of the stake found by them should be held to so reinforce their testimony as to make it conclusive. It will be remembered, however, that no witness trees now exist at appellants' asserted location, while there is one which speaks for the other location. An existing monument must be taken as a strong factor in determining a dispute of this kind. Moreover, the evidence is not conclusive that the measurement was correctly made by appellants. It does not appear that the appellant and his assistant, who made the measurement, were surveyors, and it may be assumed that they were not accustomed to handling the chain. It also appears that they followed a fence, assuming it to be upon a direct line, but the proofs do not show that it was so located, or that it followed the section line.

Further circumstances are also prominent in the case. One of the appellants says that, in 1888, he first saw the

stake and monuments where he claims the true corner to be, and that in 1890 he first saw the stake and witness tree at the point where the county claims the corner to be. He resided upon the land from 1891, knew of the location of the road in 1895, built his fence on the line of the road in 1896 in pursuance of direction by the road supervisor, and yet, until 1902, he took no steps to assert his claim that the stake he says he discovered in 1888 represented the true corner. These circumstances the trial court doubtless weighed as against the good faith of his present contention. There was evidence as to the mutilation of the bearing tree at the location claimed by the county. By whom, or in pursuance of what motive, this was done does not appear. This is a mere question of evidence, and we are unwilling to say that the trial court, who heard and saw all these witnesses testify, observing their demeanor, apparent candor, or lack of candor, as well as their apparent knowledge upon the subject, was not justified in finding, as he did, that the weight of the testimony showed the corner as claimed by the county to be the true original location.

It is also assigned that the court erred in denying the motion for a new trial. The motion is based chiefly upon a claim of newly discovered evidence. We have read the affidavits in support thereof, and also a counter affidavit, all of which are included in the statement of facts. Aside from any question of diligence to obtain the suggested evidence for the former trial, the affidavits in the record show that what is not merely cumulative is of a disputed character, and we think it was not error to deny the new trial.

The judgment is affirmed.

FULLERTON, C. J., and DUNBAR, ANDERS, and MOUNT, JJ., concur.

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[No. 5064. Decided October 14, 1904.]

CHARLES KOHN, *Appellant*, v. N. B. FISHBACH,
Respondent.¹

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FRAUDULENT CONVEYANCES—SALES—STOCK OF GOODS IN BULK—PURCHASER TRUSTEE FOR CREDITORS—GARNISHMENT AFTER DISPOSAL OF GOODS. One who buys a stock of merchandise in bulk, without complying with the statute requiring him to demand a list of the vendor's creditors and to see that the purchase price is applied to their payment, holds the property in trust for such creditors, and is liable to them in an action of garnishment, although he is not indebted to the vendor and has disposed of the goods.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered October 29, 1903, upon findings and conclusions of the court, dismissing a garnishment proceeding, after a trial on the merits before the court without a jury. Reversed.

Sharpstein & Sharpstein, for appellant.

P. J. Cavanaugh, for respondent.

DUNBAR, J.—This action was commenced by plaintiff against defendant on February 24, 1903, by the filing of an affidavit for a writ of garnishment directed to said defendant, said affidavit alleging that defendant was indebted to one Sol Hardman, and had in his possession and under his control personal property belonging to said Hardman. The answer was a denial of these allegations. The reply set up the fact that Hardman had engaged in a retail business in Walla Walla county, and, while so engaged, had become indebted to plaintiff for goods, purchased from plaintiff, and used in said retail business as a part of the stock in trade; that, while so indebted, respondent pur-

¹Reported in 78 Pac. 199.

chased said stock in bulk from Hardman, paying to Hardman the purchase price of said stock, without complying with the provisions of an act entitled, "An act to regulate the purchase, sale, transfer, and incumbrance of stocks of goods, wares, or merchandise in bulk, and prescribing penalties for the violation thereof." Laws 1901, p. 222.

The court found upon the trial, in substance, the following facts, viz.: That between the 25th day of March, 1897, and the 11th day of April, 1901, said garnisher, plaintiff in the principal case, sold and delivered to one Sol Hardman, defendant in the principal case, who was then carrying on the business of a retail liquor and cigar dealer at Waitsburg, in Walla Walla county, divers and sundry goods, wares, and merchandise, to be used by the said Hardman in his said business, and which became a part of his stock of merchandise used therein; that, after making divers and sundry payments, Hardman was indebted to said garnisher on the 13th day of December, 1901, on said sale of goods, in the sum of \$281.19; that on the 10th day of March, 1902, Hardman, in consideration of the sum of \$1,435, sold and delivered to said garnishee his said stock of goods, wares, and merchandise, in bulk; and that the said garnishee, upon the purchase of said stock, settled with Hardman and paid him therefor, without having obtained from him his verified statement of his indebtedness on account of the purchase of said stock, or of the names of his creditors, and without seeing that the purchase price of the goods was applied to the payment of the bona fide claims of his said creditors, and without paying said claims of said garnisher, who was then one of his creditors to the extent and amount above stated; that the stock of goods, wares, and merchandise, was, at the time of said sale of said Hardman to

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said garnishee, worth more than the amount of said indebtedness of Hardman to the garnisher; that afterwards, on the 12th day of March, 1902, said garnishee sold and delivered to one Grossmiller, for a consideration which the evidence did not disclose, said business and said stock of goods, and wholly parted with the possession and control thereof; found that the action had been commenced by the garnisher against Hardman for the recovery of the aforesaid indebtedness and judgment recovered, and that the writ of garnishment had issued; but found that, at the time of the service of said writ of garnishment, said garnishee was not indebted to Hardman in any sum whatever, and had not in his possession or under his control any personal property or effects of Hardman; and, as a conclusion of law, found that said garnishee was entitled to the judgment and order of the court discharging him, and was entitled to recover, by said order and judgment, his costs and disbursements. Judgment was entered in accordance with the findings, and from such judgment this appeal is taken.

It seems to us that the court placed too literal a construction upon the statute, which provides that the garnishee is amenable to the writ, first, where, at the time of its service upon him, or at the time of answering it, he was indebted to defendant in the action to which the garnishment proceeding is auxiliary; or, second, where at one of those times, he had in his possession or under his control personal property or effects belonging to such defendant. It is true, the garnishee answered, and probably in accordance with the facts, that he did not at that time have any of the property of the defendant in his possession, and that he was not indebted to him. But, in contemplation of law, he had the property of the defendant in

his hands, because, having purchased the property in fraud of law, without complying with the provisions of the law in relation to sales of property in bulk, he stood in the position of a trustee of the property, responsible to the *cestui que trust* or the creditors for the disposition of such property. It is unnecessary to cite authorities on the general proposition, for it has been held by this court, in *Fitz Henry v. Munter*, 33 Wash. 629, 74 Pac. 1003, that such was the position of the purchaser who purchased without complying with the law, the court saying:

"We are all of the opinion that the sale of these goods was a sale in bulk, within the contemplation of the act, which also provides that such sale shall be void. We also think that the object of this law was to hold the goods of debtors under such circumstances as a trust fund for the benefit of all the creditors, and to hold the purchaser in possession as a trustee for such creditors."

See, also, *Millar v. Plass*, 11 Wash. 237, 39 Pac. 956.

As to the proposition that the evidence does not show the value of the property, at the time the same was disposed of by the fraudulent vendee, the findings of fact show that the garnishee purchased this property, paying therefor \$1,435, and that the same was of more value than the amount appellant claimed.

The judgment will be reversed, and the cause remanded with instructions to proceed in accordance with this opinion.

FULLERTON, C. J., and HADLEY, and MOUNT, JJ., concur.

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Citations of Counsel.

[No. 5065. Decided October 14, 1904.]

GEORGE IVERSON, by *Henry Iverson, Guardian ad Litem,*
Respondent, v. JOHN W. McDONNELL, Appellant.¹

TRIAL—INSTRUCTIONS—PLEADINGS—AMENDMENTS DEEMED TO BE
MADE—MASTER'S PROMISE TO REPAIR MACHINERY. Instructions
upon an issue as to defendant's promise to repair machinery
not raised in the pleadings, are not erroneous where evidence
thereon was introduced without objection, since the pleadings
may be considered amended to embrace the fact.

MASTER AND SERVANT—NEGLIGENCE—INDEMNITY—FACT THAT
DEFENDANT CARRIES ACCIDENT INSURANCE—TRIAL—OBJECTIONS—
SUFFICIENCY. In an action against an employer for personal
injuries, where it is evident that the purport of questions asked
by the plaintiff's counsel was to get before the jury the fact
that the defendant was indemnified against liability by carrying
employer's liability insurance, the case will be reversed, although
defendant's first objection to such questions specified no grounds
and the second objection made was sustained.²

Appeal from a judgment of the superior court for King
county, Griffin, J., entered June 30, 1903, upon the ver-
dict of a jury rendered in favor of the plaintiff. Reversed.

Piles, Donworth & Howe, for appellant.

W. Sinks Ferguson, for respondent, contended among
other things, that the objection to the evidence was not suffi-
ciently specific. *Kroenert v. Faulk*, 32 Wash. 181, 72
Pac. 1010; *Wagner v. Mahrt*, 32 Wash. 542, 73 Pac. 675;
Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124; *Boston*
etc. R. Co. v. O'Reilly, 158 U. S. 334, 39 L. Ed. 1006,
15 Sup. Ct. 830. The last of these questions objected to
went to the credibility of the witness. *Shoemaker v.*
Bryant Lumber etc. Co., 27 Wash. 637, 68 Pac. 380.
It was not reversible error to ask incompetent questions.

¹Reported in 78 Pac. 202.

²NOTE. See, also, *Edwards v. Burke*, post, 107. REP.

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96	108
36	73
138	292
36	73
138	292
86	73
40	298

Dow v. Weare, 68 N. H. 345, 44 Atl. 489; *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494.

DUNBAR, J.—Respondent sued appellant for \$20,000 damages, claiming that he had lost three fingers of his right hand by reason of appellant's negligence in not furnishing respondent with suitable machinery to work with, in his shingle mill, which he was then operating. Judgment was recovered for \$2,000. This appeal is from such judgment.

Several errors are alleged, the first being that the superior court erred in allowing counsel for respondent to get before the jury the fact that appellant carried employer's liability insurance. Other errors assigned are upon the introduction of testimony, and instructions given and refused by the court, and the refusal of the court to grant a nonsuit. There seems to us to be no merit in the assignments in relation to the admission or rejection of testimony, or the giving or refusing to give instructions. Without specifically reviewing the instructions, it seems to us that they explicitly and clearly state the law pertinent to the case. It is true that the court instructed the jury as follows:

"If you find from the evidence that the vice-principal promised plaintiff to put the machinery and appliances in good shape, and that plaintiff relied upon said promise, and was lulled into a feeling of security by reason of such promise, and was thereby induced to continue at such work, and if he was injured by reason of defendant's failure to perform such promise, plaintiff may recover for such injury, provided you believe that he was in the exercise of reasonable care to prevent such injury at the time of its occurrence."

And it is also true that, under the pleadings, no issue of this fact is tendered. But the record shows that the issue was tendered in the testimony, without objection, and

that testimony on this proposition was offered by both the appellant and respondent, and, such being the case, the court was justified in considering the pleadings amended to embrace the issue of fact contested.

The first error assigned is, however, we are forced to conclude, well taken. Upon the cross-examination of the defendant, McDonnell, the following occurred:

"Q. (By Mr. Ferguson, counsel for respondent): Mr. McDonnell, you were the owner, and had possession and ran the shingle mill in Ballard, where George was working at the time of the injury? A. I am the owner of the mill, yes. Q. And, in case a judgment is rendered against you in this case, you will be the one who would have to pay it, will you not? Mr. Howe (counsel for appellant): I object. The Court: Objection overruled. Exception noted for the defendant. A. I suppose so; I don't know. Q. You don't know? A. I presume so. Q. Now, I will ask you if it is not a fact that you carry insurance on your men? Certain insurance company will have to pay at least a part of that judgment? A. I carry insurance—accident insurance. Q. Well, answer the question. A. I carry insurance—accident insurance. Q. And the company will have to pay at least a part of the judgment, you answer? A. I do not know whether the company will pay it or not. Q. Who pays the law firm of Piles, Donworth & Howe, you or the insurance company? Mr. Howe: I object as incompetent. Mr. Ferguson: The question is asked for the purpose of affecting the credibility of the witness. I wish to know what his interests are in this case, and it has been decided by our supreme court that it is competent. The Court: Objection sustained. Exception noted for the plaintiff."

It is a fundamental principle of law, too well established to require the citation of authority, that testimony should not be introduced in a law suit which is not pertinent to the issues involved; and it could make

no difference, so far as the merits of this case are concerned, whether the judgment which the respondent hoped to obtain should be paid by the appellant or by an insurance company. The pertinent questions, under the issues, for the jury to determine were whether or not the appellant had been guilty of negligence which was the proximate cause of the respondent's injury, and whether or not the respondent had been guilty of contributory negligence. Any testimony tending to throw light upon these two propositions was pertinent and competent. Any other testimony would have a tendency to either confuse or inflame the minds of the jurors. In *Manigold v. Black River Traction Co.*, 80 N. Y. Supp. 861, an action for injuries to a passenger, after an objection had been sustained to a question, asked defendant's witness on cross-examination, as to whom a doctor, who accompanied the witnesses on a visit to plaintiff, represented, plaintiff's counsel asked witness whether such doctor did not go to settle with plaintiff, and whether he was not representing an insurance company back of defendant, to which defendant's counsel at once objected, and which was not allowed to be answered. Held, that the asking of such question constituted reversible error, where it did not affirmatively appear that it did not affect the verdict, though the court instructed the jury that they should not regard it. That case seems to be parallel with the case at bar, the question in one instance having reference to a doctor, in the other a lawyer. In passing upon this question, the court said:

"The law is well settled that it is improper to show, in an action of negligence, that the defendant is insured against loss in case of a recovery against it on account of its negligence. This was expressly held in the case of *Wildrick v. Moore*, 66 Hun. 630, 22 N. Y. Supp. 1119.

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It is not proper to inform the jury of such fact in any manner. It is not material to any issue involved in the trial of the action, and certainly plaintiff's counsel ought not to be permitted to do indirectly what he would not be permitted to do directly. The fact that the defendant in this action was insured was brought to the knowledge of the jury as conclusively by what occurred as if the question had been answered in the affirmative, and it is evident that the question was asked and the inquiry pressed, even after the ruling of the court that it was incompetent, for the very purpose of getting such fact before the jury. Immediately before the direct question was asked, the court had ruled that the inquiry as to who Dr. Rockwell represented was incompetent, and the objection to that question was sustained, and yet plaintiff's counsel then asked the direct question, which was, in effect, a statement that there was an insurance company back of the defendant. In order to protect the defendant, its counsel was forced to object to the question, and yet by doing so he, in effect, admitted the fact; otherwise no objection would have been made. It is true the learned trial court properly struck out the answer, and instructed the jury not to consider it; but plaintiff's counsel improperly got the fact before the jury—a fact which he knew he was not entitled to, and which the court had just excluded by its ruling. We think this constituted error which requires a reversal of the judgment."

In the case at bar, it is true, the question as to who employed the attorneys for the defense was sustained by the court, but, as was said by the New York court, it had to be done over the objection of the defense, the urging of which was practically an admission of the fact. But, in addition to this, over the objection of the appellant, respondent's counsel was allowed to elicit the fact that the appellant carried accident insurance upon the men in his employment, the result of which would be, as the jury well knew, to relieve the appellant from the payment of the judgment.

It is contended by the respondent that there was no sufficient objection to this testimony made by counsel for the defense. But the testimony and objections must be considered together to properly determine this question, and, while it is true that the objection to the question "And in case a judgment is rendered against you in this case you will be the one that will have to pay it, will you not?" was simply "I object," the further objection that "I object as incompetent," was urged to the same character of questions propounded for the same purpose, viz., to show that the insurance company, instead of the appellant, would be responsible for the judgment. We think that both court and counsel were fully advised of the object of the question, and of the scope of the objections thereto. It is true, the respondent said, when the objection was made, that the question was asked for the purpose of affecting the credibility of the witness; that he wished to know what his interests were in the case. But it seems to us it plainly appears that the purpose of the question was to get before the jury, not testimony affecting the credibility of the witness, but testimony showing that the judgment would be paid by the insurance company instead of by the appellant. There was no question about the interest of the witness McDonnell. He was the defendant in the case, had testified that he was, and that he was the owner of the mill and the employer of the plaintiff in the case. And the testimony sought to be elicited by the counsel for respondent, instead of affecting his credibility by showing the responsibility of the insurance company for the judgment, would tend to strengthen the testimony of the witness by showing that he had no interest in the result of the case. Hence, it is not likely that the attorney for the respondent asked

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these questions for the purpose of strengthening the testimony of the appellant in the case.

To the effect that it is improper practice, in an action for personal injuries, for counsel, either by testimony or by remarks made to the jury, to give the jury to understand that an insurance company is defending the case, see, also, *George A. Fuller Co. v. Darragh*, 101 Ill. App. 664; *Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494; *Sawyer v. Arnold Shoe Co.*, 90 Me. 369, 38 Atl. 333. It is said by counsel for the respondent that these cases are not in point. But while, in some instances, the question was presented in a different form, they all proclaim as reprehensible the practice of endeavoring to get before a jury the fact that the judgment sought to be obtained will have to be paid by an insurance company instead of by the defendant. But even in the absence of any authority, and if the question were presented to this court as a matter of first impression, we should, without hesitancy, conclude that such practice was not in conformity with general principles of law, and hinders rather than aids the jury in arriving at a just verdict.

For the error alleged in this respect, the judgment will be reversed.

FULLERTON, C. J., and HADLEY, ANDERS, and MOUNT, JJ., concur.

[No. 5383. Decided October 17, 1904.]

THE STATE OF WASHINGTON, *on the Relation of George S. Casedy, Plaintiff, v. THE INTER-STATE FISHERIES COMPANY et al., Defendants.*¹

RECEIVERS—DISCHARGE—REVIEW BY CERTIORARI—RECEIVER NOT A PARTY. A writ of review to review an order discharging a receiver will not lie upon the application of the receiver, as he is not a party interested therein or aggrieved thereby.

Certiorari, upon application of a receiver, to review an order of the superior court for King county, Hon. William H. White, Judge *pro tempore*, entered August 8, 1904, removing the receiver, upon application of an intervenor. Writ denied.

H. E. Foster, for relator.

FULLERTON, C. J.—This is an application for a writ of review. From the affidavit filed in support of the application, it appears that the applicant was, at the suit of a creditor, appointed receiver of The Inter-State Fisheries Company, an insolvent corporation; that he duly qualified as such by giving bond and taking the oath of office; that he thereupon entered upon his duties as such receiver, and continued in the performance thereof until August 8, 1904, when he was removed by the court on the application of an intervenor in the suit in which he was originally appointed. The removal was made by a judge *pro tempore*, and it is alleged that the judge was without right to hear such an application, that he refused to hear certain evidence offered by the applicant, and that he otherwise acted arbitrarily in making the removal.

We are of the opinion that no cause for issuing the

¹Reported in 78 Pac. 202.

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writ is shown. No matter how much the receiver may feel aggrieved at the action of the court in removing him, he individually cannot complain. A party to the action has an interest in the personnel of the receiver, and it might be that, if the court should arbitrarily remove one and appoint another, he could have the orders reviewed in some way, but no such right belongs to the receiver. He may have orders relating to his compensation, his accounts, or his acts while receiver, reviewed, when he is aggrieved by such orders, but whether he personally shall or shall not continue as receiver is a question he has no right to litigate.

HADLEY, ANDERS, MOUNT, and DUNBAR, JJ., concur.

[No. 5257. Decided October 17, 1904.]

THE STATE OF WASHINGTON, *on the Relation of John Weidert, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY *et al., Defendants*.¹

JUDGMENT—VACATION ON PETITION—FINDINGS OUTSIDE THE ISSUES—REVIEW. Where a judgment is vacated on petition, the fact that the trial was not confined to the issues, as required by statute, and that findings were made outside thereof, does not require a reversal, where other findings within the issues support the judgment.

DIVORCE—JUDGMENT—VACATION—FRAUD IN PROCURING DECREE. A finding that a decree of divorce was procured by false representations of the husband, which prevented the wife from acquiring knowledge of her rights or that the action was for a divorce, is alone sufficient to sustain an order vacating the decree.

Certiorari to review an order of the superior court for King county, Bell, J., entered May 21, 1904, upon findings in favor of the defendant, vacating a decree of di-

¹Reported in 78 Pac. 198.

voice on the ground of fraud, upon the petition of defendant, after a hearing on the merits. Affirmed.

Richard Gowan, for relator.

Greene & Griffiths, for defendants.

FULLERTON, C. J.—On June 3, 1903, John Weidert, in an action pending in the superior court of King county, obtained a decree of divorce from his wife, Amalia Weidert, on the ground, as recited in the decree, that she was impotent, and incapable of discharging her marital duties because of such impotency. In February, 1904, the wife filed a petition in the above named court asking for a vacation of the decree, alleging that the same had been procured by deceit and fraud, practiced upon her by her husband and others in his employ. A hearing was had on the petition, in which the husband appeared and participated, at the conclusion of which the court vacated and set aside the decree, directed that the wife be permitted to defend the divorce action, and that the husband pay into court to her use, for that purpose, the sum of \$400, and pay to her, pending the action, for her support, the sum of \$50 per month, and that he be restrained from conveying his property, or any part thereof, pending the action, without first obtaining leave of the court so to do. The husband applied for, and obtained from this court, a writ of review, and a transcript of the record of the superior court pertaining to the several orders has been sent here pursuant to the command of the writ.

The record does not contain the evidence on which the several orders, sought to be reviewed, were based, but the court made and filed in the cause certain findings of fact on which was rested the order vacating and setting aside the decree, and it is contended that these findings are

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not within the issue made by the petition to vacate—it following of course that, if the order vacating and setting aside the decree be reversed, the orders relating to suit money, alimony, and the conveyance by appellant of his property, must fall with it.

It may be that there are findings that are not strictly within the issues made by the petition for the vacation of the judgment, and the rule of the statute, that “the cause of the petition shall alone be tried,” may have been to that extent violated. But we do not think it necessarily follows, conceding this to be true, that the order vacating the judgment should be set aside. If there are findings, sufficient in themselves to support the order, that do fall strictly within the issues made by the petition, the order will be allowed to stand, even though there are others which are outside of the issues. Such we find is the case here. The court below found that the wife was not made aware, until long after the decree of divorce was entered, of her rights as a defendant in that action, or of the fact that the action was one for divorce, and that she was prevented from acquiring such knowledge by the false, deceitful and fraudulent representations made to her by her husband. This finding alone is sufficient to sustain the allegations of the petition, it follows that the orders sought to be reviewed must be affirmed, and it is so ordered.

HADLEY, ANDERS, MOUNT, and DUNBAR, JJ., concur.

[No. 5108. Decided October 21, 1904.]

KACHELIS ZILKE, *Appellant*, v. J. R. WOODLEY,
Respondent.¹

TRIAL—DEMAND FOR JURY—WAIVER. A demand for a jury trial is waived where the trial is transferred to another judge, on the theory that the cause is of an equitable nature, with the suggestion that the party may save his right to a jury trial by a motion to remand, and no objection or motion to remand is made, and the trial is had without calling the trial judge's attention to the demand.

ASSIGNMENT—DRAFTS LEFT WITH BANK—DIRECTIONS TO APPLY AMOUNT COLLECTED. The delivery of drafts to a bank for collection, under an agreement between the payees and their creditor that the amount due him shall be credited to his account, amounts to an equitable assignment, and, upon collection by the bank, the title to the money passes to the creditor.

INTERPLEADER—ASSIGNMENT OF DRAFTS—DEFENSES—PREVIOUS CONTRACT—EVIDENCE—ADMISSIBILITY. In an action of interpleader to determine conflicting claims to money collected by a bank, waged on the theory that the same had been assigned in payment of the amount due upon a contract, evidence in relation to the contract, which is not in dispute, is inadmissible, since the claim for recovery is based on the assignment and not upon the contract.

FRAUD—CONTRACT TO LOCATE TIMBER CLAIMS—RESCISSION—KNOWLEDGE OF PARTY—VIEW OF PREMISES. Where parties are seeking to recover money paid upon a contract, whereby they were located upon certain timber claims, for false representations respecting the location and character of the claims, it is not error to confine the testimony respecting fraud to the period after the parties returned from viewing the land, where, acting upon their own knowledge and with means of knowledge, they subsequently closed the transaction, and paid the balance due.

SAME—FALSE REPRESENTATIONS—EVIDENCE—SUFFICIENCY. Findings of the trial court against the claim of fraud and false representations respecting the location and character of timber claims, inducing a contract to locate thereon, will not be disturbed where the parties subsequently viewed the lands, consulted with the officers of the land department, and afterwards paid the balance due on the contract.

¹Reported in 78 Pac. 299.

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APPEAL AND ERROR—JUDGMENT IN NAME OF FIRM—HARMLESS ERROR. In a proceeding to determine conflicting claims to money in court, the appellant, whose claim was denied, can not claim error in that the order directed the money to be paid to respondent's firm, instead of to respondent individually.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 11, 1903, upon the findings and decision of the court, after a trial on the merits before the court without a jury, determining conflicting claims to money paid into court. Affirmed.

J. D. Campbell and *P. C. Shine*, for appellant.

Merritt & Merritt, for respondent.

HADLEY, J.—The plaintiff in this action, the Traders National Bank, brought the suit against J. R. Woodley, who is the respondent here, and also joined as defendant Kachrlis Zilke, who is the appellant here. Certain other persons were also joined as defendants. The complaint alleges, that the plaintiff has in its possession \$900 in money; that said Woodley claims to be the owner and entitled to the possession thereof, and has demanded that plaintiff shall pay it to him; that the other defendants also claim to be the owners, and have demanded that it shall be paid to them. Disclaiming any interest in the money, the plaintiff brought it into court, deposited it with the clerk, and asked that the defendants should interplead, and that their conflicting claims should be determined in this action. The said defendant Zilke answered separately, alleging that his co-defendant Woodley has no interest in the money, and further that the other co-defendants have, in writing, assigned to Zilke their interest therein. He asks that the money shall be adjudged to be his, and that it shall be delivered to him.

The defendant Woodley also answered separately, and averred that he and one Hubbell were associated together, doing a general real estate business in the city of Spokane, under the firm name of J. R. Woodley & Co.; that on the 30th day of August, 1903, the other defendants entered into a written contract with said firm, by which they agreed to pay the latter the sum of \$200 for each defendant, for services in locating each defendant upon a timber claim of one hundred and sixty acres, upon unsurveyed land in the Pend d'Oreille timber district; that, by the terms of the agreement, \$50 was to be paid in advance, to cover the expense of running the lines of the several claims, and the balance of \$200 for each claim was to be paid when the said defendants had seen the land and made their selection; that, upon the execution of the contract, and contemporaneously therewith, said defendants paid thereon the sum of \$100; that thereafter Mr. Hubbell, of the above named firm, went with said defendants to said timber district, and located them upon timber claims, in conformity with the contract; that, upon the return of said defendants from the timber district, after they had been so located, and on September 3, 1903, they paid to said firm the further sum of \$50 as part payment upon the contract; that on the next day the defendants went to the bank of plaintiff, delivered to it certain bank drafts and a certain savings bank book, directed plaintiff to collect the same, and place \$1,000 thereof to the credit of said Woodley; that on the same day said Woodley borrowed of the bank the sum of \$100, and executed his note therefor, and thereafter, when the bank received the money from the said drafts, etc., it deducted from said \$1,000, which was to be credited to the account of Woodley, the sum of \$100 as and for payment of said note. The answer concludes with a prayer that J. R. Woodley

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& Co. shall be adjudged to be the owners of said \$900, and that an order be made directing it paid to them.

The said defendant Zilke, for himself and his assignors, replied to the answer of Woodley, alleging ignorance and illiteracy on the part of the defendants, and false and fraudulent representations on the part of Woodley, by which, it is claimed, they were deceived and misled as to the location, character and environment of said timber claims. He demands judgment against Woodley for \$250, being the amount of \$150 paid upon the contract, together with the sum of \$100 applied upon his note at the bank, as aforesaid. Before proceeding with the trial, the plaintiff bank, by consent of all parties, was dismissed from the action, and absolved from any liability in the premises. The cause was then tried by the court without a jury, upon the issues formed by the aforesaid pleadings between the defendants, and resulted in a judgment that J. R. Woodley & Co. are the owners, and are entitled to the possession of said sum of \$900, and it was ordered that the clerk shall pay the same to them. From said judgment and order said defendant Zilke has appealed. /

It is assigned that the court erred in refusing appellant a jury trial. The record shows that, some time before the trial, a written demand for a jury trial was filed, accompanied with the payment of \$12 as a jury fee. When the cause was about to be called for trial, the judge who was then presiding over jury trials in that court suggested that he thought the issues to be tried were of an equitable nature, and that the cause should be transferred to the judge who was presiding over the trial of equity causes. He, at the same time, suggested that, if appellant desired to save the question as to his right to a jury trial, he might do so by a motion in the other de-

partment to remand the cause back to his own for a jury trial. No objection or exception to this course was made or taken at the time, as far as appears in the record. The other judge proceeded to try the cause without a jury, and neither objection to such course, nor motion to remand, was made before him. It does not appear in the record that the judge who tried the cause ever had his attention called to the fact that a demand for a jury had been made. He was not asked to rule upon the question, and a review of that matter now would involve a question which does not appear to have been determined by him. We think, under all the above circumstances, that appellant should be held to have abandoned his demand for a jury trial. The action was brought and waged under the provisions of §§ 4843-4845, Bal. Code, and, with the view above expressed, it is unnecessary for us to pass upon respondent's contention that appellant was not, in any event, entitled to a jury trial, under the nature of the proceeding and issues.

It is next assigned that the court erred in denying appellant's motion for judgment upon the pleadings. This contention is based upon the theory that the pleadings show no title to the money in respondent. It is urged that the pleadings show the drafts to have been left with the bank by appellant and his assignors merely for collection, and that there was no assignment of the fund to respondent. Both parties were at the bank. The instructions of both to the bank were to credit respondent with \$1,000 when the money was collected. With this arrangement in view, the bank then loaned respondent \$100. In equity, and as between the parties, we think the title to the money then passed to the respondent. Of course, if the payees of the bank drafts had, after that time, notified the bank that drew them not to pay them

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to the collecting bank, the assignment would not have prevented the arrest of payment to the collecting bank, and the rights of the parties would have had to be otherwise determined. But the drafts were actually paid, and the money, title to which had already passed, came into possession of the collecting bank. The collecting bank was not a mere collecting agent for the payees of the drafts, but was, by mutual agreement of the parties, constituted the holder of the funds when collected—funds which the parties then agreed belonged to respondent. The facts, we believe, amounted to an equitable assignment, and we think the authorities cited by appellant do not reach the case. The motion for judgment upon the pleadings was not erroneously denied.

Complaint is made that the court refused to permit appellant to introduce evidence in relation to the timber locating contract heretofore mentioned. The fact that such a contract was executed by the parties was not in actual dispute, and it was the court's theory that respondent's claim for recovery was not based upon that contract, but upon the assignment of the fund at the bank. We think that view was correct, and that no prejudicial error was committed in refusing the testimony.

It is further claimed that it was error to confine the testimony of appellant concerning false representations of respondent as to the timber claims to the period after the parties returned from viewing the land. We think the court was right. Any representations made before the parties viewed the land were not pertinent, for the reason that, after viewing the land for themselves, they no longer had a right to rely upon such representations, and they thereafter proceeded in the light of their own knowledge from actual view of the premises and surroundings. This court has frequently held that one who has

the means of knowledge before him, and who refuses or neglects to avail himself thereof, is prevented from asserting that he is defrauded. See, *Sherman v. Sweeny*, 29 Wash. 321, 333, 69 Pac. 1117, and decisions of this court there cited.

It is complained that it was error to enter judgment on the evidence submitted. We shall not undertake to say that the court was in error in this particular. The parties were taken to view the land, and located thereon. After their return, they consulted the officials at the United States land office concerning their rights, and made further payment upon the contract. Afterwards they directed the collection and application of the funds to the payment of the balance due under the contract as heretofore stated. In directing the balance to be paid to respondent they must be held to have acted with all the facts before them, and we see no reason why they shall not now be bound by the assignment of their funds thus deliberately made.

It is assigned that the court erred in entering an order that the money be paid to J. R. Woodley & Co., inasmuch as J. R. Woodley only is a party to the proceeding. It is however adjudged that the money does not belong to appellant, and we are unable to see that he has cause to complain, if the court directs it paid to the firm named in the original contract out of which the assignment of this money arose.

The judgment is affirmed.

FULLERTON, C. J., and DUNBAR, ANDERS, and MOUNT, JJ., concur.

[No. 5100. Decided November 10, 1904.]

THE STATE OF WASHINGTON, *on the Relation of Frank
Krisch, Plaintiff*, v. THE SUPERIOR COURT FOR
KING COUNTY *et al., Defendants*.¹

CORPORATIONS—INSOLVENCY—ASSETS A TRUST FUND—ATTACHMENT—PREFERENCE. The assets of an insolvent corporation are a trust fund for the benefit of all its creditors, and a creditor can acquire no preference by the levy of a writ of attachment.

SAME—RECEIVERS—POSSESSION OF ATTACHED PROPERTY. As between the receiver of an insolvent corporation, and a creditor having a prior attachment lien, the solvency of the corporation at the time the writ was levied determines the right to the possession of the attached property.

SAME—DETERMINATION OF INSOLVENCY—PARTIES. Where a corporation is adjudged insolvent and a receiver appointed, without bringing in or concluding a creditor holding a prior attachment, but the creditor subsequently becomes a party to the suit by intervention, the question of the solvency of the corporation may be thereafter determined in the same action, upon the receiver's petitions alleging insolvency and a citation to the creditor directing him to show cause why he should not surrender the property, at which time he may litigate the question.

Application to the supreme court for a writ of prohibition, filed April 6, 1904, to enjoin the superior court for King county, Bell, J., from enforcing orders to deliver property to a receiver. Writ denied.

Willett & Willett, for relator.

H. E. Foster, for defendants.

MOUNT, J.—Application for a writ of prohibition. Upon the return to the show-cause order heretofore issued in this case, the following facts appear: Upon February 24, 1904, relator, who is a stockholder in the Interstate Fisheries Company, a corporation, brought two actions

¹Reported in 78 Pac. 461.

in King county against that corporation. One of the actions was based upon an alleged indebtedness for services, and the other, for damages on account of fraudulent representations in the sale of stock to relator by certain officers of the corporation. On the same day the actions were begun, relator sued out a writ of attachment in each of said cases, by virtue of which writ the sheriff of King county seized, and took into his possession, all the property of the corporation.

On the 26th day of February, 1904, another stockholder, George Hemmi, brought an action against the said corporation, alleging an indebtedness due him from said corporation, and the insolvency of the corporation, and praying for the appointment of a receiver. Neither the relator nor the sheriff was made a party to this action. On the same day that this last named action was brought, George S. Casedy, the manager of the corporation, appeared therein, and confessed the allegations of the complaint of Hemmi against the corporation, and consented to the appointment of a receiver. Thereupon the court appointed said Casedy receiver, and directed him to take possession of all the property of the corporation. The sheriff and the relator, who was placed in charge of the attached property as keeper thereof, refused to deliver the property to the receiver. Relator then filed a petition in intervention, in the action of Hemmi against the Interstate Fisheries Company, alleging that the said corporation was not indebted to said Hemmi in any amount, but that Hemmi was largely indebted to said corporation; and further alleged fraud and collusion on the part of said corporation and its manager Casedy, whereby the said Casedy was appointed receiver. Subsequently, on April 4, 1904, Casedy, as receiver, filed a petition in said cause of Hemmi against the Interstate Fisheries Company, alleging that the

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sheriff of King county was in possession of all the property of said corporation, under the writs of attachment named above, and that he refused to deliver possession of said property to said receiver, and also that the said Interstate Fisheries Company was insolvent at the time said writs were sued out; and prayed for an order directed to the sheriff and relator requiring them to show cause why the property of said corporation should not be delivered to the receiver. A show cause order was issued, as prayed. Relator thereupon applied to this court for a writ prohibiting the lower court from interfering with the possession of the attached property in the hands of the sheriff.

Assuming, without deciding, that this is a proper case for the writ of prohibition, it must be denied. This court has held, in *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. 810; *Compton v. Schwabacher Bros. & Co.*, 15 Wash. 306, 46 Pac. 338; and *Washington Liquor Co. v. Alladio Cafe Co.*, 28 Wash. 176, 68 Pac. 444, "that the assets of an insolvent corporation are a trust fund for the benefit of all its creditors." This being the rule, an attaching creditor acquires no preference over other creditors, by reason of attachment, when the corporation is insolvent at the time of the levy of the writ. *Compton v. Schwabacher Bros. & Co.*, *supra*. The question, therefore, which determines the right of relator to the property of the corporation, in preference to the other creditors, is the solvency of the corporation. This question was determined by the court in *Hemmi v. The Interstate Fisheries Co.*, when the receiver was appointed. But neither the relator nor the sheriff was made a party to that action. They were, therefore, not bound by that adjudication. But, after that adjudication was made, and after relator had become a party by intervention to the action in

which it was made, the receiver applied to the court, by petition, alleging the insolvency of the corporation, and thereupon a citation was issued to the sheriff and relator, directing them to appear and show cause why they should not deliver possession of the property of the corporation to the receiver. Upon a return to this order, they, of course, will have an opportunity to litigate the solvency of the corporation, which determines their rights.

Counsel for relator, however, relies upon the rule announced by this court in *State ex rel. Arthur Machinery Co. v. Superior Court*, 7 Wash. 77, 34 Pac. 430, and *State ex rel. Hunt v. Superior Court*, 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354. The first of these cases is not in point, for the reason that the attachment debtor was a private person, and his property was not subject to the same rule as that of an insolvent corporation. The next case is in point to the effect that the receiver is not authorized to take possession of the property in possession of the sheriff, under an attachment levied prior to the appointment of a receiver, where the sheriff and the attaching creditors were not made parties to the action in which the receiver was appointed. But in the case now before us, the sheriff and the attaching creditor are brought into the case by citation, and are thereby afforded an opportunity to have their rights adjudicated upon hearing. In this respect this case is distinguishable from the *Hunt* case, *supra*. It is true, the court in that case said: "Under such circumstances the receiver must resort to an action at law to obtain possession." But this, of course, means any suitable action in accord with legal principles. We think that, where the only question as to the rights of the parties to the possession of the corporate property depends upon the solvency of the corporation, the court may proceed to determine that ques-

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tion, as was being done in this case when the temporary writ issued.

For the reasons herein given, the court was acting within its jurisdiction, and the writ is therefore denied. Costs will be taxed against relator.

FULLERTON, C. J., and DUNBAR, ANDERS, and HADLEY, JJ., concur.

[No. 5051. Decided November 11, 1904.]

CRANE COMPANY, *Respondent*, v. PACIFIC HEAT & POWER
COMPANY *et al.*, *Appellants*.¹

PRINCIPAL AND SURETY—APPLICATION OF PAYMENTS—SCHOOL BUILDING CONTRACT—INDEMNITY—SURETY WHEN NOT BOUND BY APPLICATION. Where a surety company guarantees the faithful performance of a school building contract, pursuant to the statute for the benefit of laborers and material men, and the contractor pays the money received from the school district to a party who furnished material for the building, and to whom the contractor was indebted, also, upon an older unsecured account, the surety is not bound by an application of the school money to the old account, but is entitled to have the same applied on the school contract in discharge of its liability.

APPEAL AND ERROR—BRIEFS—STIPULATION—ASSIGNMENT OF ERRORS. A stipulation that appellant might file a supplemental brief "citing additional points and authorities," is not intended to authorize a new assignment of error, and the same will not be considered.

Appeal from a judgment of the superior court for King county, Morris, J., entered November 10, 1903, dismissing the action, upon sustaining a demurrer to affirmative defenses in the answer. Reversed.

Shank & Smith and *Root, Palmer & Brown*, for appellants.

¹Reported in 78 Pac. 460.

Hawley & Huntley and *George A. Hawley*, for respondent. The surety was bound by the application of the payment to the older and unsecured account. *Post-Intelligencer Pub. Co. v. Harris*, 11 Wash. 500, 39 Pac. 965; *Smythe v. New England etc. Co.*, 12 Wash. 424, 41 Pac. 184; *Zinns Mfg. Co. v. Mendelsen*, 89 Wis. 133, 61 N. W. 302; *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940; *The Katie O'Neil*, 65 Fed. 111.

DUNBAR, J.—This is an action brought by the plaintiff, a wholesale and retail plumbing house, against the Pacific Heat & Power Company, a contracting concern engaged in the installment of steam heating and ventilating plants, and the Aetna Indemnity Company, to recover the purchase price of certain plumbing and steam fitting supplies, furnished under contract with the Pacific Heat & Power Company, had with the board of directors of Seattle school district No. 1. The complaint, among other things, states that in July, 1902, the Pacific Heat & Power Company made an agreement with the board of directors of Seattle school district No. 1 to furnish and install a heating and ventilating plant in what is known as the Warren avenue school building, for which the school district was to pay the sum of \$7,997; alleges that, to secure faithful performance of this contract, the defendant, the Aetna Indemnity Company, became surety, and that the bond was given under and pursuant to the laws of the state of Washington; that, between November 1, 1902, and February 7, 1903, plaintiff sold and delivered to the Pacific Heat & Power Company goods, wares, and merchandise, to be used in and about the heating and ventilating of the building, of the agreed value of \$1,930.47, and that these goods, wares, and merchandise were used in the Warren avenue school building, and there has been paid on account thereof only

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\$118.59, leaving a balance due of \$1,811.88; and judgment was prayed jointly and severally for this amount.

The Aetna Indemnity Company alleges, by way of affirmative defense, that, prior to July, 1902, at which time the Pacific Heat & Power Company entered into an agreement with the school board with reference to the Warren avenue school, they had been purchasing large bills of goods, wares, and merchandise from the plaintiff for heating and ventilating other buildings, for the payment of which the Aetna Indemnity Company was not liable; alleges that, after the purchase of the goods, wares, and merchandise from the plaintiff, which purchases were made between October 22, 1902, and January 31, 1903, and amounted to \$1,939.47, the Pacific Heat & Power Company received certain payments from the board of directors on account of the contract price of the heating and ventilating plant in the Warren avenue school, and, out of the moneys so received, paid the plaintiff \$500 on December 17, 1902, and \$500 on February 16, 1903, both of said payments being applied by the plaintiff on the old accounts other than that contracted for the Warren avenue school, the application of said payments having been made without the knowledge or consent of the appellant. The answer further alleges, that, at the time the application of these payments was made, the plaintiff knew that the moneys so received were payments to the Pacific Heat & Power Company from the board of directors on account of the Warren avenue school contract, and that the plaintiff made the application of these payments as it did, to the old accounts and to accounts for which the Aetna Indemnity Company was not liable, with the intent, and for the purpose, of defrauding the Aetna Indemnity Company out of its just rights, and to impose additional burdens upon the Aetna Indemnity Company other than those assumed by its bond;

that the accounts to which said payments were thus fraudulently applied were unsecured, and the application of the payments was made in fraud of the rights of this surety; that, after the plaintiff had wiped out all of its old debts with this money which it knew had come from the Warren avenue contract, it applied the remainder, amounting to \$118.59, to the goods purchased on account of the Warren avenue school contract. The answer also sets forth that, if these payments had been applied as the Aetna Indemnity Company is equitably entitled to have them applied, there would remain due on account of the Warren avenue school contract only \$811.88 instead of the \$1,811.88, as prayed for in the complaint. A general demurrer was interposed to these affirmative defenses, which was sustained by the court. The defendants refusing to plead further, judgment was entered as prayed for in the complaint. From this judgment this appeal is taken.

It will be seen that the question for decision here is whether the appellant, the Aetna Indemnity Company, is equitably entitled to have the payments which were made to the Pacific Heat & Power Company, under the Warren avenue school contract, applied to the indebtedness of the Warren avenue school, for which the indemnity company is surety, or whether the respondent could apply them to other and older indebtedness, for which the indemnity company was in no wise responsible, and which was unsecured. We think, under both authority and right reasoning, that the indemnity company had an equitable right to have the money which was paid to the respondent by its principals on the bond applied to the liquidation of the debt for which the security was given. The Aetna Indemnity Company did not undertake to secure the payment to the respondent of any old claims which were then due and unsecured, or any claims other than the one which was the

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subject of the contract, viz., the Warren avenue school contract. It cannot be gainsaid that, as a general rule, a surety has no right to direct the application of a payment made by its principal; but this case falls without, rather than within, the reason of the rule. Appellant cites to sustain its contention, *Merchants' Ins. Co. v. Herber*, 68 Minn. 420, 71 N. W. 624; *Young v. Swan*, 100 Iowa 323, 69 N. W. 566; and *Crane Bros. Mfg. Co. v. Keck*, 35 Neb. 683, 53 N. W. 606. Respondent undertakes to distinguish these cases from the case at bar, and, while it is true that the facts are not exactly the same—as facts seldom are the same in any two cases—yet the principles announced in the cases cited undoubtedly sustain appellant's contention. In *Merchants' Ins. Co. v. Herber*, *supra*, it was decided that, where the specific money paid to the creditor, and applied on the debt of the principal, for which the surety is not bound, is the very money for the collection and payment of which he is surety, he is not bound by such application, and is equitably entitled to have the money applied to the payment of the debt for which he is liable. In the discussion of this case, it is said by the court:

“It is true, as a general proposition, that a surety cannot direct the application of payments made by his principal, and is bound by any application made by the principal and creditor, or either of them. This rule, as thus broadly stated, applies to cases only where the principal makes the payment from funds which are his own, and free from any equity in favor of the surety to have the money applied in payment of the debt for which he is liable. Hence, where the specific moneys paid to the creditor, and applied on a debt of a principal for which the surety is not held, are the very moneys for the collection and payment of which he is obligated to the creditor, he is not bound by such application, and is equitably entitled to have the moneys applied to the payment of the debt for which he is surety, unless the creditor can show that he has a superior

equity to have them applied as they were applied. The adjudged cases are not harmonious on this proposition, but any attempt to here cite and analyze them would be unprofitable. Many of them which are apparently conflicting may be reconciled by observing the distinction between payments made from funds which were the absolute property of the principal, and those made from funds affected by an equity in favor of the surety. Upon principle, we hold that the proposition that we have stated is correct."

It will be seen, from the allegations of the answer in this case, that the moneys applied upon the old debts by the respondent were the very moneys for the collection and payment of which the surety was obligated to the creditor, and, under the rule announced above, and which seems to us to be the right and equitable rule, the surety is not bound by such application. The judgment will be reversed, with instructions to overrule the demurrers to the affirmative defenses.

After the filing of the appellant's brief, which discussed alone the propositions we have just decided, and the filing of the respondent's brief in answer to points and authorities in appellant's brief, the following stipulation was entered into:

"It is hereby stipulated by and between George A. Hawley, attorney for respondent, and Shank & Smith and Root, Palmer & Brown, attorneys for appellants, that the said appellants may file a supplemental brief herein on or before Saturday, April 23, 1904, citing additional points and authorities."

Under the provisions of this stipulation the appellant filed a brief attacking the sufficiency of the complaint. We have not examined this assignment of error, for we do not think it is properly here. It was evidently not the intention of the respondent, in entering into this stipulation, to give its consent to new assignments of error, but

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Statement of Case.

simply to allow the appellant an opportunity to amplify or elaborate its brief, so far as the citation of points and authorities is concerned.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

[No. 5101. Decided November 11, 1904.]

J. M. NOLAN, *Appellant*, v. M. H. ARNOT, *Respondent*.¹

36	101
136	691
36	101
640	578
36	101
141	643

APPEAL—FINAL ORDERS—VACATION OF JUDGMENT. An order vacating a judgment of foreclosure of a tax certificate, which also quashes the service of summons, sets aside the tax deed, and directs redemption from the tax upon payment of the same, with costs, is appealable as a final judgment, although there is no formal order of dismissal of the action, since it effects a disposition of the whole case.

APPEAL—BONDS—TAX LIEN FORECLOSURE—SPECIAL APPEAL ACT. The plaintiff in a tax lien foreclosure may appeal from a judgment denying his right to foreclose, by giving an appeal bond under the general law of appeals, since the special provisions of Laws 1897, p. 186, as amended by Laws 1903, p. 75, requiring the bond on an appeal from a tax judgment to be served at the time of taking the appeal, conditioned for the payment of the tax, applies only to appeals by the party resisting the tax.

JUDGMENT—VACATION—RECITALS AS TO SUMMONS AND JURISDICTION—MOTION TO VACATE. Where a judgment contains recitals showing due service of process, with other findings sufficient to show jurisdiction, the presumption of jurisdiction is not overcome by defects in the record, and hence an unsupported motion to vacate the judgment, based upon the record in the cause, is demurrable.

Appeal from an order of the superior court for King county, Bell, J., entered March 22, 1904, vacating a judgment in a tax lien foreclosure and directing redemption, upon overruling a demurrer to defendant's motion to vacate the judgment. Reversed.

¹Reported in 78 Pac. 463.

Roberts & Leehey, for appellant.

H. H. Eaton, for respondent.

DUNBAR, J.—Delinquency tax certificates were issued against lot 1, block 59, in Riley's Addition to South Seattle, for the year 1893, and subsequent years. On July 3, 1900, J. M. Nolan, owner of such certificates, instituted suit to foreclose. On September 17, 1900, judgment was entered in said suit. On December 1, as the result of said foreclosure and sale, tax deed issued to Nolan, and said deed was, on said date, duly filed for record in the office of the county auditor of King county, Washington. All subsequent taxes have been paid by Nolan. March 8, 1904, M. H. Arnot, the respondent herein, filed a motion to vacate the former judgment. On March 22, 1904, said motion to vacate was granted over the demurrer of the plaintiff to the effect that the notice stated no sufficient facts to justify a vacation of the judgment. The court sustained the motion to vacate, on the ground that the publication of summons was insufficient. From the judgment entered therein this appeal is taken.

The respondent moves to dismiss this appeal for the reason that the vacation of a judgment is not an appealable order, and for the further reason that this judgment was rendered in a special proceeding providing for the assessment and collection of taxes under the revenue law of 1897, p. 186, as amended by the law of 1899, and as further amended by the law of 1903, p. 75, which provides that appeals shall be taken thirty days after the entry of the judgment, and further provides that, when a written notice of appeal is given, the appeal bond shall be served at the time of the service of the notice of appeal. It is admitted that this was not done in this case, the rec-

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ord showing that, when the written notice of appeal was served, no bond was served on respondent or his attorney. It is true that this court has held, in *Nelson v. Denny*, 26 Wash. 327, 67 Pac. 78; *Freeman v. Ambrose*, 12 Wash 1, 40 Pac. 381, and other subsequent cases, that appeal from a judgment of vacation will not be entertained. Those cases were decided on the theory that appeals should not be tried in this court piecemeal, and that the record upon the final decision of the case on appeal would bring up the errors alleged, and that all the questions involved should be tried upon the final appeal. But the judgment in this case goes beyond the mere vacation of the judgment. After reciting the history of the case, the judgment is as follows:

"It is therefore ordered, considered, and decreed that the purported summons on said defendant J. M. Nolan by publication be and the same is hereby declared null and void and the same is quashed and vacated; that the judgment and order of sale heretofore ordered in this cause in favor of plaintiff and against said defendant, decreeing a sale of the following described property (describing it) be and the same hereby is declared to be null and void and it is hereby vacated and set aside, to which ruling, order and judgment of the court vacating and quashing the summons and service thereof and the judgment heretofore rendered herein, the plaintiff excepted and excepts. It is further ordered and decreed that the deed heretofore given by the treasurer of King county to the above named plaintiff J. M. Nolan for said property be and the same hereby is declared null and void, and said treasurer is hereby directed upon payment to him by defendant of the amount of taxes due upon said above described property and heretofore paid by plaintiff, together with interest thereon at the rate of fifteen per cent. per annum to the date of such payment by the defendant, together with all taxes which have since said sale become due and payable against said property, whether paid or unpaid, to issue a certificate of

redemption to such party making such payment, which amount so paid shall be paid by said county treasurer to the above named plaintiff or order, to which ruling and judgment of the court the plaintiff excepted and excepts. It is further ordered that said M. H. Arnot recover of and from said plaintiff any and all costs herein, and that any and all costs heretofore allowed said plaintiff in the said purported foreclosure of delinquency certificate be and they are hereby set aside and disallowed, and said defendant is authorized and allowed to deduct from the amount to be paid said county treasurer the amount of his costs incurred herein taxed at the sum of \$5."

So that it would seem that the judgment in this case went beyond the mere vacation of the original judgment, and that all the questions which the appellant would have a right to try upon a retrial of the cause after the vacation of the judgment have already been tried by the court. It is true that there is no formal order of dismissal of the action. But that, it seems to us, is purely incidental to the main provisions of the judgment, and the judgment rendered is in effect a disposition of the whole case. For that reason an appeal should be allowed from said judgment.

On the other proposition, that no sufficient bond was given or served, it is true that this court held in *Rogers v. Trumbull*, 32 Wash. 211, 73 Pac. 381, a case which seems to be relied upon by the respondent, that, on an appeal by a party who is resisting the payment of taxes, in an action for the foreclosure of certificates of delinquent taxes upon real estate, under the provisions of the laws of 1897, p. 186, subsequently amended in 1903, the appellant should give the bond provided for in § 104 as amended by the laws of 1903, p. 74, and that such bond must be served upon the respondent at the time the notice of appeal was given in conformity with the statute. But the appellant

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in this cause did not attempt to give the bond provided for in the statute above alluded to, nor to serve it as provided in such statute; but simply gave his bond under the general provisions of law relating to appeals. And this we think was sufficient. This question has been squarely decided by this court in *Meagher v. Hand*, 28 Wash. 332, 68 Pac. 892. There it was said:

"In our opinion, this section has no application to an appeal by a holder of a delinquency certificate from a judgment denying his right to foreclose the same. Such a holder is under no obligation to pay to the county or to any person any 'taxes, assessments, interest or penalties,' upon the real estate involved in the appeal, nor can any such be adjudged against him or the real estate involved, whether his appeal is successful or unsuccessful. Such taxes, assessments, interest, and penalties, are owing to him, if owing at all; not by him. Manifestly, the legislature did not intend to require so absurd a thing as the giving of a bond conditioned to pay taxes by the one to whom they are owing as a condition precedent to his right to appeal from a judgment denying his right to collect them. The costs of the appeal is all that the respondent can recover if the appeal is unsuccessful, and this is amply covered by the ordinary appeal bond, which the appellant did give."

This brings us to the merits of the case, and the question presented is whether the court was justified in vacating the judgment. The judgment which was vacated recites in specific terms that the notice and summons in said suit was regularly and duly served on the defendant, as the law in such cases required, with the other findings sufficient to show jurisdiction in the court to render the judgment which was rendered. It has been the uniform holding of this court that the recitation in a judgment of jurisdictional facts, sufficient to give the court jurisdiction to pronounce the judgment, is proof of such jurisdiction. In *Ballard v. Way*, 34 Wash. 116, 74 Pac. 1067,

it was held that, "where the judgment of a superior court recites, 'the notice and summons . . . was regularly and duly served on the . . . defendants as the law in such cases requires,' a presumption of jurisdiction of the person is raised, which is not overcome by the fact that the record otherwise shows no service of process, or by proof that defendant was a domestic corporation, whose officers were residents of the county, so that personal service would be requisite;" citing *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050; *State ex rel. State Ins. Co. v. Superior Court*, 14 Wash. 203, 44 Pac. 131; *State ex rel. Boyle v. Superior Court*, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. 724; *Kalb v. German Sav. etc. Soc.*, 25 Wash. 349, 65 Pac. 559, 87 Am. St. 757; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; and *Noerdlinger v. Huff*, 31 Wash. 360, 72 Pac. 73. It was said in that case that eminent authority had decided this question the other way, but that, in view of what this court deemed the weight of authority and the better reasoning, such had been its uniform holdings, and with such holdings this court was satisfied to abide. The same doctrine was announced in *Taylor v. Huntington*, 34 Wash. 455, 75 Pac. 1104.

The court, appearing by the recitals of the judgment to have had jurisdiction of the cause at the time of the trial sufficient to render the judgment which was rendered, we think erred in vacating the judgment. For this error the cause will be reversed, and the lower court instructed to proceed in accordance with the views expressed in this opinion.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

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[No. 5010. Decided November 14, 1904.]

ADELE EDWARDS, *Respondent*, v. THOMAS BURKE *et al.*,
Appellants.¹

EVIDENCE—EXPERTS—LEADING QUESTIONS—HARMLESS ERROR. It is not reversible error to permit a leading question to be asked a physician who was being examined as an expert.

NEGLIGENCE—GUARANTY—FACT OF INSURANCE AGAINST LOSS—EVIDENCE INCIDENTALLY DISCLOSED. Upon the proper cross-examination of a witness for defendant in a personal injury case, it is not reversible error that testimony was incidentally disclosed tending to show insurance against the loss, where no motion was made to withdraw the testimony, or admonish the jury not to consider it, and the respondent did not intend to disclose the fact, and was in no way to blame therefor.

CARRIERS—NEGLIGENCE—ELEVATORS—DEGREE OF CARE REQUIRED OF OWNER. The owner of an office building is required to exercise the highest degree of care in the operation of an elevator whereby persons are carried, the same as though he were a common carrier of passengers.

VERDICT—EXCESSIVE. A verdict will not be set aside as excessive when it does not appear that it was the result of passion or prejudice.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 13, 1903, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries received in an elevator. Affirmed.

Piles, Donworth & Howe, for appellants.

E. F. Blaine and Tucker & Hyland, for respondent.

DUNBAR, J.—The respondent sued appellants for \$10,000 for injuries claimed by her to have been caused by the negligence of appellants in maintaining and operating a passenger elevator in the Burke building in the city of Seattle. Upon the trial of the cause, verdict was rendered

¹Reported in 78 Pac. 610.

by the jury for \$4,000. Motion for new trial was made, and denied. Judgment was entered, and appeal taken therefrom.

It would serve no purpose to set forth the circumstances under which the accident causing the injury occurred. On the question of the negligent operation of the elevator, the testimony was conflicting. The jury decided the issues in favor of the respondent. It is urged that the court erred in allowing the respondent to ask the witness, Dr. Eagleson, over appellants' objection, the following question: "Is it not a fact that usually such a severe shock as that, had by a woman, especially of her age, leaves them practically the balance of their lives apprehensive and nervous, and affected by it more or less, so far as their nervous organization is concerned?" This was objected to because it was leading, and in a sense it was leading; but, inasmuch as it was expert testimony which was being introduced, we do not think any reversible error was committed in admitting the question asked.

It is next contended that the court erred in allowing counsel for respondent, over the objection of counsel for appellants, to bring out of the witness Archie Ester, a witness examined in behalf of appellants, the fact that appellants carried liability insurance upon the elevator. If this state of facts were shown by the record it would undoubtedly constitute reversible error, for this court has lately held, in *Iverson v. McDonnell*, ante p. 73, 78 Pac. 202, that evidence tending to show that the defendant in a personal injury case was insured was immaterial, prejudicial, and reversible. The cases supporting that doctrine, cited by the appellants in this case, were considered by the court in the investigation of the case just above referred to, but, while they are applicable to that case, we are

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not convinced that they are applicable to the case at bar. The following is all the testimony upon the subject of insurance. Upon cross-examination of appellants' witness Archie Ester, who had been relating his view of the circumstances under which the accident took place, the following occurred:

"Q. (By counsel for plaintiff): Did you ever make a statement as to how this accident occurred, prior to today? A. I made one to Mr. Lamping. Q. Who is Mr. Lamping? Mr. Howe: I object, as immaterial. The Court: Answer the question. Mr. Howe: We except. A. He is the gentleman that insures the elevator. Q. Why did you make that statement to Lamping? A. He asked me to because—I don't know the reason why he wanted the statement from me how the accident occurred."

This is about all that occurred on the subject. The testimony wandered off from this into other fields of inquiry. This would scarcely be testimony sufficient to sustain an allegation that the elevator had accident insurance at the time of this accident. But, even conceding that the jury might be led to believe from this statement that the appellants were protected by an insurance company from accidents which might occur in the operation of the elevator, it seems to us to be very justly contended by respondent's counsel that they were not responsible for it. It is asserted that they did not know who Mr. Lamping was, and that there was no intention of bringing the question of insurance before the jury. It does appear that, in the exercise of a proper cross-examination, this testimony incidentally cropped out. But certainly the question whether or not the witness had ever before made any statement in relation to the accident was a proper subject of cross-examination, and, after eliciting the fact that he had made a statement to a Mr. Lamping, we know of no reason why the

respondent should be prohibited from propounding the very natural inquiry as to who Mr. Jamping was. About all that can be said in this case is that, during the cross-examination, which was properly conducted, testimony was disclosed tending to show the insurance of the elevator. But the respondent in no way having been to blame for this, it seems to us that it would be unjust that she should be, for this reason, subjected to a reversal of her cause. Especially is this true where there was no motion made to withdraw the testimony from the consideration of the jury. And, while we think, with the great weight of authority, that in cases of this kind the damage is largely done when the testimony is once admitted to the ear of the jury, yet, where it appeared in as weak a form as it did in this case, and without fault on the part of the plaintiff, all that could have been done would have been the giving of an admonition by the court to disregard the testimony.

The other errors relate to instructions, and are based upon the theory that the same rule of law in regard to the degree of care will not apply to persons operating an elevator as applies to railroads or other common carriers. The following instruction was offered by the appellants, the refusal to give which is assigned as error, viz.:

"You are instructed that the owner and operator of an elevator in an office building is not a common carrier, and is not held to the highest degree of care to preserve the safety of persons carried therein. The law imposes upon the owners of such elevators the duty of using ordinary care to see that the elevator is in a reasonably safe condition."

The court instead gave the following instruction:

"The liability of the operator of such an elevator is somewhat analogous to that of a common carrier. While

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the payment of fare is not required, yet the operator of an elevator, having invited the public to enter, assumes to exercise the highest degree of care in the operation of that elevator that is consistent with practical conditions."

And the following, also, which was excepted to:

"The operator of an elevator is not an insurer of the lives or limbs of the passengers entering the elevator. He is not bound to perform the impossible, or the impracticable, or the unreasonable; but he is bound to do what can be done, consistent with reason and practicability, to see that persons entering the elevator are protected from accidents which might be avoided, and it is for you to say in this case, so far as the charges against the defendants are concerned, whether, in view of the surroundings at the time, the defendants did, through their agent, exercise that degree of care when the plaintiff entered that elevator, and when she attempted to depart from it."

The appellants cite three cases, viz.: *Griffen v. Manice*, 166 N. Y. 188, 51 N. E. 925, 82 Am. St. 630, 52 L. R. A. 922; *McGrell v. Buffalo Office Bldg. Co.*, 153 N. Y. 265, 47 N. E. 305; and *Shattuck v. Rand*, 142 Mass. 83, 7 N. E. 43, in sustentation of his contention. An examination of these cases shows that what is said in them applies to the mechanical construction of the elevator, rather than the mode of operating it. But, whatever may be said of the logic of the distinctions which are attempted to be drawn between care in the construction of an elevator and care in its operation, the overwhelming weight of authority is to the effect that the same degree of care is required in the operation of an elevator as in the operation of a railroad. Mr. Thompson, in his *Commentaries on the Law of Negligence*, Vol. 1, page 980, under the subject head "Degree of care required in the construction and operation of passenger elevators," says:

"Modern judicial authority assimilates the legal status of the owners or occupiers of buildings who construct or

operate passenger elevators therein, whereby persons are conveyed from one story in the building to another, to that of a common carrier of passengers and imposes upon such persons the same extraordinary obligation of care and skill;"

citing *Marker v. Mitchell*, 54 Fed. 637, affirmed in *Mitchell v. Marker*, 62 Fed. 139, 25 L. R. A. 33; *Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, 16 Am. St. 700, 4 L. R. A. 673; *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 50 N. E. 178, 64 Am. St. 35; *Field v. French*, 80 Ill. App. 78; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010; *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 13 Am. St. 175, 5 L. R. A. 498; *Southern Bldg. etc. Assn. v. Lawson*, 97 Tenn. 367, 37 S. W. 86, 56 Am. St. 804; and many other cases too numerous for citation. Proceeding, the author says:

"The reason for this rule need not be enlarged upon. Obviously there can be no distinction between a general undertaking to carry passengers vertically and the similar undertaking to carry them horizontally. The carrier in each case is the bailee, so to speak, of human beings, and has their lives in his custody."

And this text is adopted and followed by the overwhelming, if not universal, weight of authority. So that we think there was no error committed by the court in the instructions refused or given.

It is also assigned as error that the verdict was excessive. But, from an investigation of the record in this case, we are unable to determine that the verdict was the result of passion or prejudice, and do not feel at liberty to disturb the judgment of the jury in that respect.

There being no reversible error discovered, the judgment will be affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

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Syllabus.

[No. 5253. Decided November 14, 1904.]

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638 822

JACOB SWOPE *et al.*, Plaintiffs, v. CITY OF SEATTLE *et al.*,
Defendants.¹

EMINENT DOMAIN—INJUNCTION AGAINST CITY IMPROVEMENT UNTIL DAMAGES ARE PAID—DAMAGES—ASSESSMENT BY JURY WITHOUT REGULAR CONDEMNATION PROCEEDINGS. Where an action, is brought by an abutting property owner to enjoin a city from further damaging the plaintiffs' property in improving a street, until compensation shall first be paid therefor, and a jury is called at plaintiffs' request for the purpose of assessing damages, it is not error to submit to the jury, over plaintiff's objection, the question of what future damages the plaintiffs will suffer by the city's completion of the improvement, where no prejudice appears from the mere fact that the damages were not ascertained by a jury impaneled in a regular condemnation proceeding.

JURORS—CHALLENGE. In an action against a city, a challenge to a juror for implied bias solely because he had performed clerical work for the city is properly denied.

EVIDENCE—EXPERTS—LIMITING NUMBER. It is within the discretion of the court to limit the number of expert witnesses called to testify to the value of land.

EMINENT DOMAIN—EVIDENCE—DAMAGES. In an action to ascertain the damages to abutting owners by a change of grade, it is proper to exclude mortality tables showing the expectancy of plaintiffs' lives, and, also, evidence as to the effect upon their health that might result from climbing the flight of steps made necessary by the improvement.

SAME—STATEMENTS BY CONTRACTOR—HEARSAY. In such an action it is proper to exclude the statements of the contractor as to plaintiffs' damages, since that would be hearsay as against the city.

SAME—DAMAGES—VALUE OF SOIL. Where an abutting lot is sloped off to meet a change of grade in the street, the soil which is removed is not land taken, and the actual value thereof is not to be added to the damages to the land not taken.

APPEAL—TRIAL—READING LAW TO JURY—INSTRUCTIONS. Error can not be predicated upon the refusal of the trial court to allow

¹Reported in 78 Pac. 607.

counsel to read a decision of the supreme court to the jury, where the instructions which were given to the jury are not brought up in the record.

APPEAL AND ERROR—REVIEW—AMOUNT OF RECOVERY. Error in that the amount of a verdict was too small cannot be urged in the supreme court when the evidence upon which the same was based is not included in the record on appeal.

Certiorari to review a judgment of the superior court for King county, Morris J., entered July 1, 1904, upon findings in favor of the defendant, after an assessment of damages by a jury, in a proceeding to enjoin the damaging of abutting property by the improvement of a street. Affirmed.

C. L. Parker, for plaintiffs.

Mitchell Gilliam, *Wm. Parmelee*, and *Hugh A. Tait*, for defendants.

ANDERS, J.—The plaintiffs were, at and before the commencement of this action, the owners of, and were residing upon, lots 13 and 14 in block 20, in Brooklyn Addition to the city of Seattle, which premises are situated on the northeast corner of Tenth avenue southeast and Fortieth avenue east, in said addition to the city of Seattle. The city, having concluded to grade the streets above mentioned, in front of and adjoining the property of the plaintiffs, in accordance with an ordinance authorizing (as it alleges) such improvement, was proceeding by its servant and contractor, William Stanley, to lower the surface of the streets, and to slope the property of the plaintiffs from the natural surface thereof down to the street grades established by the city. The top of the slope which the city was making seems to have been from 16 to 18 feet back from the margin of the street, and the object of making

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it was to prevent the soil from sliding down on to the street.

After this work had progressed to some extent, the plaintiffs instituted an action in the superior court of King county to enjoin the city, its board of public works, and the contractor, from proceeding further "until just and lawful compensation shall be made to the plaintiffs for taking and damaging the said premises." Upon the filing of the complaint, a preliminary injunction was issued, and a hearing was subsequently had on an order to show cause why the same should not be made permanent. At this hearing the plaintiffs, by their counsel, paid the statutory jury fee, and requested the court to call a jury, presumably to determine the damages which would result to their property by reason of the grading of the streets and the removing of earth from their premises. A jury was accordingly impaneled, and the question of the amount of damages which would be sustained by the plaintiffs on account of the making of the proposed improvement was by the court submitted to them for determination. It seems, however, that the plaintiffs suggested to the court at the trial that the jury ought to be authorized to assess only the damages which had already been sustained by plaintiffs because of the wrongful acts of the defendant city, and not such as would thereafter accrue by reason of the completion of the proposed improvement; but the court, as we have seen, did not favorably consider that suggestion. The jury returned a verdict in favor of the plaintiffs, and assessed their damage, over and above all special benefits, in the sum of \$100. The court, after overruling a motion for a new trial, entered judgment on the verdict, and the plaintiffs thereupon applied to this court for a writ of certiorari to review the proceedings of the court

below. The writ was granted, and a transcript of the records and proceedings was accordingly certified to this court. On the return day of the writ a hearing was had, both parties being represented by counsel, and the cause was submitted for final determination.

It is contended, on the part of the plaintiffs, that the trial court had no right or power to submit to the jury, in this equitable proceeding, the question of the amount of compensation to be made to plaintiffs for taking or damaging their property; and, in support of this contention, it is earnestly insisted that the method provided by the legislature, whereby private property may be appropriated by cities of the first class for street purposes, is exclusive and must be pursued in all cases. Our statutes prescribe just what steps shall be taken by cities of the first class, when they undertake to condemn private property for the purpose of changing the grades of streets. Bal. Code § 775, *et seq.* It is provided, in substance, among other things, that, whenever such city shall have passed an ordinance providing for appropriating or damaging private property for public use, it shall file a petition in the superior court of the county in which such city is situated, in the name of the city, praying that just compensation, to be made for the private property to be taken or damaged for the improvement or purpose specified in such ordinance, "be ascertained by a jury or by the court in case a jury be waived." The statute then prescribes what the petition shall contain. It also provides for the issuance of a summons, and the service thereof upon the persons made parties defendant in the proceeding. It is admitted that the city did not, prior to the commencement of the improvement in question, file a petition in the superior court praying that just compensation, to be made for the

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taking or damaging of the property of the plaintiffs, be ascertained in the manner provided in the statute above mentioned.

This statute, prescribing the procedure in cases where it becomes necessary to appropriate or damage private property for public use, was evidently enacted for the sole purpose of establishing a reasonable and certain method of ascertaining the just compensation which the constitution declares "shall be first made or paid into court for the owner". of the property sought to be taken or damaged. Const. art. 1, § 16. And we have no doubt that, under the law and the constitution of this state, a corporate body, having the right to exercise the power of eminent domain, may be enjoined from taking or damaging private property for public use until just compensation is made or paid into court for the owner. In fact, this question has been definitely settled by former adjudications of this court. See *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201. But it must be conceded that the provisions of the statute, and the constitution above referred to, apply only to cases where private property is to be taken or damaged *in invitum*, and that neither the law nor the constitution precludes the owner from voluntarily agreeing that his property may be taken, either for a stipulated compensation, or without any compensation whatever. It does not appear that the city was in this instance proceeding arbitrarily and in defiance of law and of the rights of the plaintiffs. On the contrary, it was acting upon the belief, as shown by its answer to the complaint, that the plaintiffs had agreed that, if it would "slope" the sides of their property adjacent to the streets, as it commenced to do, they would not claim any damages on account of the im-

provement. And, if such was the case, it was, of course, unnecessary for the city to institute condemnation proceedings for the purpose of ascertaining the damage to plaintiffs' premises. The plaintiffs denied, in their reply to the city's answer, that they ever entered into the alleged agreement with the city or any of its representatives, and their counsel now claims that the plaintiffs were deprived of their constitutional and legal rights by reason of the submission of the question of damages to the jury which was impaneled in this proceeding. And the argument is, as we understand it, that, inasmuch as this particular jury was not summoned by the defendant city in a proceeding instituted by it for the purpose of ascertaining the compensation to which the plaintiffs were entitled, the court was not warranted in permitting and directing them, over the plaintiffs' objection, to assess the damage which would be occasioned to the property of the plaintiffs by the making of the contemplated improvement.

It is, perhaps, needless to say that it was not necessary to have the assistance of a jury in order to obtain an injunction against the defendant. The plaintiffs could have accomplished that object simply by proving that their property was being taken or damaged by the defendant without their consent, and without first making just compensation therefor. The plaintiffs, however, demanded a jury, which, as we have observed, was duly impaneled. But, notwithstanding the fact that plaintiffs' counsel had himself asked the court to call the jury, he objected to the submission of the question of the amount of plaintiffs' damages to such jury for the alleged reason, it seems, that that question could legally be determined only by a jury selected in a condemnation proceeding instituted by the city in accordance with the

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provisions of the statute. The court, however, concluded that the plaintiffs could not be prejudiced by the determination of the amount of their damages at that time by the jury; that the constitution only requires the amount of damages to be ascertained by a jury, and that there was no necessity for a multiplicity of suits. And, under the circumstances, we think the conclusion of the court was right. If it was not the original intention of the plaintiffs to submit the question of damage to the jury, it is difficult to understand the object they had in view in asking the court to call a jury. It certainly can not be reasonably assumed that the plaintiffs were, as they seem to argue, prejudiced by the mere fact that the damages sustained by them were not ascertained by a jury impaneled in a regular condemnation proceeding instituted by the defendant city. They had the right to have the amount of their damages determined by an impartial jury, and we have discovered nothing in the record showing that they were deprived of that right.

The plaintiffs complain of the action of the court in overruling their objection to one of the jurors on the ground of implied bias. It appears that the juror was objected to solely for the reason that, at a time prior to the trial, he had performed some clerical work for the city. The challenge was properly denied.

During the progress of the trial the plaintiffs offered in evidence certain mortality tables showing the expectancy of their respective lives, for the alleged purpose of showing the length of time "during which the extra burden and inconvenience placed upon the plaintiffs in the use of their home, and the extra steps that the plaintiffs would be obliged to climb up and down in going to and from their property, on account of the proposed change in the grade of the streets abutting on their said

property." The court excluded the evidence so offered, and the plaintiffs contend that it thereby committed error. But plaintiffs' counsel has not mentioned any principle or rule of law thus violated or ignored by the court, and it would seem to require no extended argument to demonstrate the propriety of the ruling in question. And the same may be said with regard to the action of the court in refusing to permit a physician to testify as to the injurious effect which would, or might be, caused upon the health of a woman by climbing "such a flight of steps as is necessary to be constructed at the plaintiffs' premises to enable them to get to and from their residence after the streets are graded as proposed." The court refused to permit the respective parties to examine more than three real estate expert witnesses as to the value of the plaintiffs' premises. That was a matter resting largely in the discretion of the court, and we are not convinced that such discretion was abused, or that the plaintiffs were injuriously affected by the ruling of the court.

It is also contended that the trial court erred in refusing to permit one Mrs. Fraser to testify to certain statements made to her by the defendant contractor, William Stanley, at the time he commenced to grade the streets, and to slope the plaintiffs' premises, in regard to plaintiffs being entitled to damages. It is argued, on behalf of the plaintiffs, that the statements of Stanley were, under the circumstances, part of the *res gestae*, and therefore admissible in evidence. But we are not of that opinion. As to the city, such declarations were but hearsay evidence, and for that reason, if for no other, they were properly excluded from the jury.

It appears from the bill of exceptions, as we interpret it, that the plaintiffs claimed, at the trial, that the removal of the soil taken from the plaintiffs' premises in sloping

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the margins thereof constituted a taking of property in contemplation of the constitution, and that they were entitled to recover the actual value to them of the earth so removed, together with the damage to the land not taken, which would be caused by the grading of the streets. The court, however, seems to have ruled that the effect of what the defendants were doing was simply a damage to the plaintiff's property; and we are inclined to think that the court's ruling was correct; but, even if it was not, we fail to see how plaintiffs were prejudiced thereby, inasmuch as it was for the jury to determine, from all the facts and circumstances in evidence, the "just compensation" to which the plaintiffs were entitled by reason of the *acts* and *doings* of the defendants.

The next assignment of error relates, apparently, to the evidence as to the character and extent of the slope that the city was making, as it claims, for the plaintiffs. The evidence as to that matter was conflicting, and we are unable to say that the jury did not determine it correctly.

It is further contended that the court erred in refusing to instruct the jury in accordance with the law as laid down by this court in the case of *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, and in refusing to allow plaintiffs' counsel to read the decision in that case, and to state to the jury that the doctrine there announced should be approved and applied to this case. The instructions given by the court to the jury are not embodied in the record before us, and we would not, therefore, be justified in concluding that the jury was not properly instructed as to the law applicable to the case at bar. And, inasmuch as it was the duty of the judge under the constitution to "declare the law" to

the jury, we are of the opinion that he committed no error in not permitting the jury to be enlightened upon the matters of law in the manner attempted by counsel.

In regard to the verdict, the plaintiffs claim, among other things which we do not deem it necessary to mention, that the amount of their recovery is too small, and that they are therefore entitled to a new trial. But these are questions which we are unable to determine, for the reason that the evidence upon which the jury and the trial judge based their conclusions is not in the record.

We find no substantial error in the record, and the proceedings in the superior court are therefore affirmed.

HADLEY, MOUNT, and DUNBAR, JJ., concur.

[No. 5424. Decided November 29, 1904.]

ALICE A. ELLIS, *Respondent*, v. L. D. BARDIN *et al.*,
Appellants.¹

APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT. Where the appellant fails to file any transcript, or order the same prepared, for more than ninety days, and, after motion to dismiss the appeal, prepared and filed a transcript without giving any excuse for the delay, the appeal will be dismissed for failure to diligently prosecute it (Fullerton, C. J., and Anders, J., dissenting).

Appeal from a judgment of the superior court for Chelan county, Neal, J., entered June 6, 1904, upon motion of the plaintiff for judgment upon the pleadings, in an action on contract. Appeal dismissed.

S. D. Griffith, for appellants.

Frank Reeves, for respondent.

¹Reported in 78 Pac. 677.

36	122
38	576
36	122
39	113
36	122
40	115

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Opinion Per MOUNT, J.

MOUNT, J.—Respondent moves to dismiss this appeal for the reason that no transcript was filed in the lower court within ninety days after the appeal was taken. Judgment was entered on June 6, 1904. The appeal was taken on July 27, 1904. On October 29, 1904, which was ninety-four days after the appeal had been taken, respondent served upon appellant his motion to dismiss the appeal. At that time no transcript had been filed, the clerk of the lower court had not been requested to make one, and no extension of the time had been made by stipulation or otherwise. Subsequent to the filing of the motion to dismiss, and on November 10, 1904, the transcript was filed in the lower court, and subsequently, on the 16th of November, sent to this court. No excuse is shown or offered for this delay in filing the transcript below. In *Prescott v. Puget Sound Bridge & Dredging Co.*, 30 Wash. 158, 70 Pac. 252, we held that the statute relating to the filing of the transcript was directory, and did not oust the court of jurisdiction. In that case the transcript was not filed at the time the appellant served and filed his opening brief, and the ninety-day period had not expired when the motion was made. We therefore refused to dismiss the appeal, but imposed terms upon the appellant instead. See, also, *Johnson v. San Juan Fish etc. Co.*, 30 Wash. 162, 70 Pac. 254; *Chapin v. Port Angeles*, 31 Wash. 535, 72 Pac. 117. In each of these cases the transcript was filed below at or before the time when the motion to dismiss was made. While the statute is directory, yet we think that an appellant prosecuting an appeal in good faith should comply with its terms, or offer some reasonable excuse why he has not done so. None whatever is offered here. The negligence is not of the clerk, nor of the respondent, but solely of the appel-

lants. The appeal has not been diligently prosecuted. It therefore will be dismissed.

DUNBAR and HADLEY, JJ., concur.

ANDERS, J., dissents.

FULLERTON, C. J.—I dissent. The case is before us, and I think the appellant should be permitted to prosecute it upon terms.

[No. 5155. Decided December 7, 1904.]

W. E. ANDERSON, *Appellant*, v. HENRY J. MCGREGOR
et al., *Respondents*.¹

APPEAL—APPEALABLE ORDERS—INJUNCTION—DISSOLUTION—FINDING OF INSOLVENCY. An order dissolving a temporary injunction is not appealable, under Pierce's Code, §1048, unless the court has found that the party enjoined was insolvent, as such finding is jurisdictional to the appeal.

APPEAL—REVIEW—STATEMENT OF FACTS—AFFIDAVITS—HOW BROUGHT UP. Upon an appeal from a judgment dissolving a temporary injunction, based upon the complaint and the evidence in the form of affidavits submitted, there can be no reversal where the affidavits are not brought up in a bill of exceptions or statement of facts, and the appeal will be dismissed on motion.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered October 13, 1903, upon a motion to dissolve a temporary injunction. Appeal dismissed.

H. E. Foster, for appellant.

J. W. A. Nichols, for respondents.

DUNBAR, J.—This action was brought October 3, 1903, by the appellant against the respondents, the object being to obtain a permanent injunction against the respond-

¹Reported in 78 Pac. 776.

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Opinion Per DUNBAR, J.

ents, restraining them from a further commission of the acts complained of. A temporary injunction was issued by the court, which was afterwards, on motion of the respondents, dissolved. From the judgment dissolving the injunction, this appeal is taken.

The respondents move to dismiss the appeal, for the reason that it does not appear that the superior court found upon the hearing that the party against whom the injunction was sought was insolvent. Section 1048 of Pierce's Code provides that, "any party aggrieved may appeal to the supreme court in the mode prescribed in this title from any or every of the following determinations, and no others, made by the superior court, or a judge thereof, in any action or proceeding." Subdivisions 1 and 2 describe certain judgments or orders, and subdivision 3 is as follows:

"From an order granting or denying a motion for a temporary injunction, heard upon notice to the adverse party, and from any order vacating or refusing to vacate a temporary injunction: Provided, That no appeal shall be allowed from any order denying a motion for a temporary injunction or vacating a temporary injunction unless the judge of the superior court shall have found upon the hearing, that the party against whom the injunction was sought was insolvent."

And it is contended that a finding of insolvency is jurisdictional to an appeal from such order, and must affirmatively appear, and we are inclined to think, from the provisions of the statute, that this contention is correct.

It is also insisted that the appeal should be dismissed for the reason that the entire judgment appealed from is based, as appears from the judgment itself, upon the pleadings and evidence submitted in the form of affidavits filed. The record shows this to be the case. These affidavits are not made a part of the record in this case,

either by bill of exceptions or statement of facts, and, while this objection might more appropriately be raised on the merits of the case than on a motion to dismiss, it is, in any event, fatal to the appellant's right to have the judgment of the lower court reversed in this court. This question has been discussed and decided adversely to appellant's contention in *Johnson v. Spokane*, 29 Wash. 730, 70 Pac. 122. and *Pierce v. Fawcett*, 31 Wash. 271, 71 Pac. 1011.

The motion to dismiss the appeal is sustained.

FULLERTON, C. J., and MOUNT, ANDERS, and HADLEY, JJ., concur.

[No. 5287. Decided December 8, 1904.]

THE STATE OF WASHINGTON, *Appellant*, v. ED. NELSON
*et al., Respondents.*¹

CRIMINAL LAW—BURGLARY—ATTEMPTS—LIEN OF LIVERY STABLE KEEPER—GENERAL OWNER DEPRIVING KEEPER OF SPECIAL PROPERTY—INFORMATION—SUFFICIENCY. An information charging the owner of horses with unlawfully breaking and entering the livery and boarding stable wherein they were kept by another, who had a valid lien upon and special property in the horses for his charges in feeding and caring for them, with intent to fraudulently and feloniously take the horses from and to deprive such keeper of his lien and the amount due him, which is specified, is not demurrable for want of sufficient facts to state an offense, since the lien of the keeper is property in himself secured by his possession, of which the general owner was attempting to feloniously deprive him.

Appeal from a judgment of the superior court for Okanogan county, Martin, J., entered May 10, 1904, upon sustaining a demurrer to an information, dismissing a prosecution for burglary. Reversed.

E. K. Pendergast, for appellant.

Reported in 78 Pac. 790.

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Opinion Per HADLEY, J.

HADLEY, J.—This action was commenced by the filing of an information containing the following averments and charges, viz.:

“Comes now E. K. Pendergast, prosecuting attorney in and for Okanogan county, state of Washington, and by this information does accuse one Ed. Nelson and one Jane Nelson (the true Christian name of said Jane Nelson being to said prosecuting attorney unknown) with the crime of burglary committed as follows, to wit: He, the said Ed. Nelson and she, the said Jane Nelson, whose true Christian name is to said prosecuting attorney unknown, in the county of Okanogan, state of Washington, on or about the 29th day of December, A. D. 1903, did then and there unlawfully, feloniously, and burglariously break and enter a certain stable, then and there in the actual and lawful possession of one W. W. Alderman, with the intent then and there, and therein, fraudulently, unlawfully, and feloniously to take from the possession of said W. W. Alderman, two horses, to wit: two geldings of the value then and there of thirty dollars each, and each and both of said geldings were then and there in said stable deposited with and entrusted to the care and keeping of said W. W. Alderman, by the owner thereof for the purpose of being fed and cared for in said stable, and said stable was then and there a livery and boarding stable, and said W. W. Alderman was then and there the keeper of said livery and boarding stable, and said geldings and each of them were then and there held in said stable by said W. W. Alderman for security for the payment of the amount then and there due said W. W. Alderman for feeding and caring for said geldings, to-wit: the sum of four dollars for each of said geldings, for which said sum said W. W. Alderman then and there had a valid and existing livery and boarding stable keeper's lien on each of said geldings; and the said Ed. Nelson, and Jane Nelson, whose true Christian name is to said prosecuting attorney unknown, did then and there unlawfully and feloniously and burglariously break and enter said stable with the intent then and there to take each

(and both of said geldings from the possession of said W. W. Alderman, without his consent and against his will, with the intent then and there to deprive the said W. W. Alderman of the value of his said lien and the amount so due him for the feeding and caring for said geldings and each of them, and to appropriate said geldings and each of them to the use of said Ed. Nelson and said Jane Nelson, and the said Ed. Nelson was then and there the owner of each and both of said geldings, subject to said lien, and neither of said geldings had been theretofore stolen stock, contrary to the statute in such case made and provided and against the peace and dignity of the state of Washington."

The defendants demurred to the information, for the alleged reason that it does not state facts sufficient to constitute any crime, misdemeanor, or offence, under the laws of the state of Washington. The demurrer was sustained, and judgment was entered dismissing the action. The state has appealed.

The crime intended to be charged is that of burglary committed by an unlawful breaking and entering, with an intent to commit a crime, under the terms of § 1606, Pierce's Code, and § 7104, Bal. Code. The acts charged in the information amounted to a burglarious entry, with intent to commit larceny, unless the element of ownership as alleged negatives the criminal intent. It will be observed that the information charges that the geldings were owned by one of the defendants, and it appears to have been the view of the trial court that one cannot steal property of which he is the owner. Such is, no doubt, true when the property is rightfully under the owner's immediate dominion and control; but one may be the general owner of a chattel, while another may have a special interest or property in it, together with the right to its immediate possession. The facts alleged in the information show that the keeper of the

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livery barn had such a special property in these animals, and that he was entitled to their possession. Sections 6146, 6147, Pierce's Code, and §§ 5971, 5972, Bal. Code. He was interested in the animals to the extent of the value of the feed he had furnished them, and the care he had given them. The theory of the law is that he had added that much to the value of the owner's property, and that added value became property in himself, secured by the possession of the animals. To have taken the animals from him, under the fraudulent and unlawful circumstances alleged in the information, would have been to feloniously deprive him of his property.

"While one cannot, generally speaking, steal that which is his own, and it has been declared that this is the rule without qualification, yet it is well settled that a chattel, the general ownership of which is in one person, may be in the possession of another by virtue of some special right or title, as bailee or otherwise, so that a taking by the general owner from the person in possession will be larceny, if done with the felonious intent of depriving such person of his rights or charging him with the value of the chattel." 18 Am. & Eng. Enc. Law, p. 499 (2d ed.).

A number of English and American decisions are cited in support of the above text, and we need not further refer to them. We think the court erred in sustaining the demurrer to the information. The judgment is therefore reversed, and the cause remanded, with instructions to the lower court to overrule the demurrer.

FULLERTON, C. J., and MOUNT, DUNBAR, and ANDERS, JJ., concur.

[No. 5298. Decided December 10, 1904.]

JOHN B. REED, *Appellant*, v. A. L. BROWN *et al.*,
Respondents.¹

In the Matter of the Guardianship of Wm. St. M.
BARNES, JR.

INFANTS—APPOINTMENT OF GUARDIAN—TEMPORARY GUARDIAN TO COLLECT ESTATE—WHEN NECESSARY. Where, upon conflicting applications for the appointment of a general guardian of a minor, aged eight years, who is an orphan, having an estate of \$7,000 consisting of the amount due on policies of life insurance, the court appoints a suitable and responsible person, resident in this state, to act as the general guardian, it is error to appoint, without any application therefor, a temporary guardian for the purpose of collecting the amount due upon the insurance policies, no necessity appearing for such appointment, as the necessary result would be a waste of the estate in the payment of fees.

Appeal from part of an order of the superior court for King county, Bell, J., entered February 23, 1904, after a hearing upon the merits of conflicting applications for the appointment of a guardian of a minor. Reversed.

Mitchell Gilliam, for appellant.

MOUNT, J.—This appeal is from an order of the superior court of King county appointing a temporary guardian for a minor. In November, 1903, appellant filed a petition, alleging the necessary facts, and praying that he be appointed guardian of the person and estate of Wm. St. M. Barnes, Jr., a minor. In December, 1903, James V. Pelletier filed a similar petition praying for his appointment as guardian of said minor; and in January, 1904, J. B. Bridges also filed a petition praying for his appointment as such guardian. No other peti-

¹Reported in 78 Pac. 783.

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Opinion Per MOUNT, J.

tions were filed. After the statutory notice had been given, all three of these petitions came on for hearing at the same time, and the lower court, after hearing the evidence, made findings as follows:

"That Wm. St. M. Barnes, Jr., is a minor of the age of about eight years; that his mother died when he was about eight months of age; that his father died at Seattle in King county, Washington, on the 22d day of November, 1903, and that for a long time prior to his death the father of said minor was a resident of King county, state of Washington, and said minor lived with his said father up to the time of the death of said father at said place; that the petitioner John B. Reed is a resident of Pierce county in the state of Washington, is forty-four years of age, and is a married man, has a large home and fine grounds in the city of Tacoma where he resides, which home and grounds are in close proximity to a fine school and is in the residence district of said city, and said petitioner Reed and wife have no children; and that, during about three years, the said minor has lived with the said petitioner Reed and wife and there is a strong and mutual affection existing between said minor and said Reed and wife; that said petitioner Reed is a successful business man and has accumulated property in the state of Washington of the value of about \$40,000, which is all free and clear of indebtedness, and said Reed and wife are people of high moral standing in the community in which they reside, and the said petitioner Reed is the county treasurer of Pierce county in said state; that said petitioner Reed voluntarily offered in court to take care of the said child, feed, clothe, and educate him, free of any and all expense to the estate of said minor, and that said minor desires to be given into the custody of said petitioner Reed and wife; that many times prior to the death of the father of said minor he, the father of said minor, expressed the wish to his most intimate friends that in case of his death he desired the said petitioner John B. Reed to have the care and custody of the said minor, and on several

occasions stated to his said friends that arrangements had been made whereby said Reed was to have the guardianship of said minor in case of the death of said father; that the petitioner J. B. Bridges is a resident of the city of Portland, Oregon, and is of the age of sixty years, and that the wife of said petitioner Bridges resides with him and is of the age of about sixty-four years, and that they are the parents of five children, the youngest of whom is about nineteen years of age; that said Bridges is the father of the deceased mother of said minor; that ever since the said minor was of the age of about one year great bitterness and animosity existed between the said petitioner Bridges and the father of said minor; that when said minor was of the age of about ten months his father took him away from the house and home of the petitioner Bridges by force and placed him in the care and custody of other residents of Portland, Oregon, where said minor remained at different periods, in all about two years; that at all of the said times the persons having the custody of said minor made no objection to the said petitioner Bridges or any member of his family visiting said minor; that the daughters of said Bridges visited said minor about one week after said minor was first removed from said Bridges, and again about one week after that, and that thereafter and until the death of the father of said minor neither the petitioner Bridges nor any member of his family made any effort whatever to visit said minor or to send said minor any tokens of affection or their esteem, although for about two years no objections were made on the part of the persons having said minor in custody to the said petitioner Bridges or any member of his family visiting said minor as often as they might see fit; that said Bridges and his family are total strangers to said minor, and said minor has no natural affection for them; that said petitioner James V. Pelletier is a single man of the age of about ——— years, and has no home whatever to take said child, and stated upon the witness stand that he had no place to keep said minor; that said petitioner Pelletier is the resident manager of the ———

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insurance company for Western Washington, which insurance company has written an accident policy upon the life of the father of said minor in the sum of \$5,000; that there are insurance policies upon the life of the father of said minor and payable to said minor aggregating the sum of \$7,000. From the foregoing findings, the court concludes that said petitioner John B. Reed is a fit and proper person to be appointed guardian of the person and estate of the said minor; and that the petitions of James V. Pelletier and J. B. Bridges should each be denied."

Thereupon the following order was entered:

"Wherefore, in consideration of the premises, it is ordered and adjudged that the petitioner John B. Reed be, and he is hereby, appointed permanent guardian of said minor Wm. St. M. Barnes, Jr., said appointment to take effect and become operative only upon the final discharge by this court of the temporary guardian hereinafter appointed and named, and that he henceforward have the custody of said minor, and that the prayer of the petitions of the said petitioners J. B. Bridges and James V. Pelletier be, and the same are each hereby, denied. And it is further ordered that A. L. Brown be and he is hereby appointed temporary guardian of the estate of the said minor, for the purpose solely of collecting said insurance policies and reducing the other assets belonging to the said minor into cash, upon his executing and filing, in the form and manner prescribed by law, of a bond in the sum of \$15,000, and to hold such amounts so collected until ordered by this court to deliver the same into the hands of the said John B. Reed; and that the said John B. Reed be not required to enter into any bond as guardian of said minor until such time as such funds shall have been collected and are ready for delivery to him as permanent guardian of said minor."

Mr. Reed appeals from that part of the order appointing A. L. Brown as temporary guardian, and that part

which provides that Mr. Reed's appointment shall take effect and be operative only upon the final discharge of the temporary guardian. The respondent Brown has made no appearance here, and no respondent's briefs have been filed upon this appeal.

There is certainly no justification in the record before us, either in fact or law, for that part of the order appealed from. There was no petition filed for the appointing of Mr. Brown, or any other person, as a temporary guardian, and there is no finding to the effect that such temporary guardian is necessary. In fact, it clearly appears that the appellant is a proper and suitable person to be appointed guardian of the said minor and his estate, and that there is *no necessity* for the appointment of a temporary guardian. The permanent guardian is the proper person, and the only one necessary, to collect the estate of the minor. The necessary result of such temporary appointment would be a waste of the estate of the minor in the payment of fees.

That part of the order appealed from is therefore reversed, and the cause remanded with instructions to the lower court to enter an order appointing appellant guardian, and disallowing any fees to other applicants; the costs of this appeal to be taxed against respondent A. L. Brown.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

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Opinion Per HADLEY, J.

[No. 5379. Decided December 10, 1904.]

J. W. BROWN, *Respondent*, v. ROSE A. DAVIS, *Appellant*.¹

APPEALS—JUDGMENT IN TAX LIEN FORECLOSURES—APPLICATION OF SPECIAL APPEAL ACT. The special provisions of Laws 1903, p. 74, § 4, requiring appeals from the judgment in an action to foreclose a tax lien to be taken within thirty days, applies to suits by individual holders as well as county suits, and to all judgments against the owner of the land which are final in effect; hence an appeal by defendant from an order denying a motion to vacate a judgment of foreclosure, will be dismissed if not taken within thirty days (Fullerton, C. J., dissenting).

36	135
137	630
36	135
30	150

Appeal from an order of the superior court for King county, Bell, J., entered June 10, 1904, after a hearing upon affidavits before the court without a jury, denying defendant's motion to vacate a judgment foreclosing a tax lien. Appeal dismissed.

Willett & Willett, for appellant.

Steele & Brown, for respondent.

HADLEY, J.—Respondent moves to dismiss this appeal upon several grounds. An action was instituted to foreclose a delinquency tax certificate, of which the respondent was the holder. On the 21st day of August, 1903, an order of default was entered against appellant, and this was followed by the entry of a decree of foreclosure on the same day. Thereafter and on May 27, 1904, the appellant appeared in the same action, and, by motion, asked the court for an order vacating said decree. The motion to vacate was denied by an order duly entered June 17, 1904. Notice of appeal from the last mentioned order was served upon respondent's attorney August 30, 1904.

¹Reported in 78 Pac. 779.

The first ground urged for dismissal is that the appeal was not taken within thirty days after the entry of the order denying the motion to vacate the judgment. Respondent contends that the appeal should have been taken within thirty days, under the terms of § 4, p. 74, *et seq.*, Sess. Laws, 1903. It will be observed, by reference to that section, that appeals from the judgment of foreclosure in a tax proceeding must be taken within thirty days, and respondent urges that the same rule must apply to an appeal from an order in the same action refusing to vacate such a judgment. Appellant argues that the statute cited does not apply to appeals where the litigation is between a private certificate holder and the owner of the property, and that it applies solely to foreclosures conducted in the name of the county. We find no sufficient reason appearing in the statute for such a distinction, and we believe the time named in the statute was intended to apply to all appeals from foreclosure judgments in tax proceedings.

But appellant further urges that, in any event, the statute especially relates to appeals from a tax foreclosure judgment only, and that this is not such an appeal, but is one from an order refusing to vacate a judgment. It is argued that, since the revenue statute does not, in terms, refer to appeals from such orders or judgments as the one sought to be reviewed here, we must therefore refer to the general statute relating to appeals. If the general statute applies here, the appeal was taken in time. The judgment was final as to appellant's demand, and the appeal was taken within ninety days. The revenue statute cited, in terms, provides that "appeals from the judgment of the court may be taken to the supreme court at any time within thirty days" etc. It is true, the judgment theretofore specially mentioned in the stat-

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ute is the one foreclosing the tax lien, but the words "the judgment of the court" seem to be broad enough to comprehend any final judgment rendered in the action against the owner of the land whereby he is deprived thereof. The tax foreclosure proceeding is a special one, governed by special statutory rules, and, if appellant's contention should obtain, it would lead to the anomalous result of a special limitation as to an appeal from the judgment of foreclosure, while the general limitation would apply to another order or judgment in the same proceeding, and one which is final in effect. Either one is "the judgment of the court," and we think must be subject to the same limitation under the statute.

The appeal is therefore dismissed.

MOUNT, DUNBAR, and ANDERS, JJ., concur.

FULLERTON, C. J. (dissenting)—I dissent. The rules governing the right of appeal are fixed by statute. The statute in plain terms provides that an appeal from an order refusing to vacate a judgment may be taken at any time within ninety days after the entry of the order, and I see no more reason for refusing to follow the mandate of the statute in this case than in any other. Courts should not be over zealous in searching for reasons for the dismissal of appeals. The purpose of an appeal is to have a review of a cause upon its merits, and the construction of the statutes should be with a view to accomplish that end, rather than to dispose of them without such review.

[No. 4972. Decided December 10, 1904.]

WILLIAM F. HAYS, *Plaintiff*, v. S. A. CALLVERT *et al.*,
as ex-officio Board of State Land Commissioners,
Defendants.¹

TIDE LANDS—APPRAISEMENT—RIGHTS OF CONTRACTOR EXCAVATING WATER-WAY—LIEN NOT DEPENDENT ON APPRAISEMENT—REMEDY BY FORECLOSURE. Section 10 of the Act of March 9th, 1893, relating to the excavation of waterways and the filling in of tide lands belonging to the state, which provides that, upon the letting of the contract, the lands shall be appraised and never disposed of for less than the appraised value, is not mandatory in requiring such appraisement to be immediately made; and the contractor, who is given a lien on the filled in tide lands, with an option under certain conditions to purchase the same at the appraised value, is not entitled to a writ of mandamus requiring such appraisement to be made, when the lands had already been sold by the state prior to the completion of the contract; since the law does not require the retention of the lands by the state, and the contractor's lien is not dependent upon the appraisement, his remedy, after a sale of the lands, being an action of foreclosure of the liens, as provided for in the act.

Application to the supreme court, filed December 16, 1903, for a writ of mandamus, to compel the appraisement of tide lands. Writ denied.

Vance & Mitchell, and *W. F. Hays*, for plaintiff.

The Attorney General, for defendants.

L. C. Gilman, *W. A. Peters*, *John H. Powell*, and
H. R. Clise, *amici curiae*.

MOUNT, J.—Original application for writ of mandamus to compel the board of state land commissioners to appraise certain tide lands. The petition alleges, in substance, that on August 3, 1895, the state of Washington, by its duly authorized agent, the commissioner of

¹Reported in 78 Pac. 793.

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public lands, entered into a contract with W. F. Hays and Frank Shay, pursuant to the act of March 9, 1893, (p. 241) entitled, "An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state, granting rights-of-way across lands belonging to the state," by which contract said Hays and Shay agreed to excavate a certain waterway and fill in certain tide lands therein named; that on February 26, 1896, the said parties agreed upon a modification of the original contract, which was duly approved by the governor; that thereafter the interests of Shay in said contract were duly assigned to the petitioner Hays. The terms and conditions of this contract, as alleged in the petition, are stated in *Hays v. Hill*, 23 Wash. 730, 63 Pac. 576, and therefore need not be restated here. The petition further alleges as follows:

"That on May 4th, 1896, the plaintiff fully entered upon the performance of his said contract, and commenced driving piles for the construction of the bulkhead as required by said contract, and procured for said purpose several thousand piles necessary for the construction of said bulkheads and underwent an expense of several thousand dollars for the getting ready and for the object of fully carrying out and completing said work provided by said contract, and fully performing the same fully and legally; but on or about May 5th, 1896, while so at work performing his said part of said contract, plaintiff was duly notified by the commissioner of public lands of the state of Washington, as was his right under the law, that he had elected to exercise his right provided by said contract, of changing the form of bulkhead to be used by plaintiff under the terms of said contract, and would proceed to formulate and prescribe further plans for the construction of such new style of bulkhead which would be required by the state in carrying out said con-

tract, and thereupon notified and required and ordered plaintiff to suspend operations under said contract until such plans and specifications for such new style of bulkhead should be determined upon and communicated to plaintiff and publicly announced. Thereupon said plaintiff, by order of said commissioner, acting for the state of Washington, suspended said work under said contract, and neither said commissioner nor said state has yet advised plaintiff of the kind of bulkhead required, though frequently requested by plaintiff so to do, yet at no time refusing to do so, nor has said commissioner withdrawn the order commanding this plaintiff to cease work on the said filling or in the fulfilling of his said contract; that shortly after the said action of the said commissioner aforesaid suspending operations on said work by plaintiff, and on or about, to wit, the 13th day of November, 1896, said commissioner further notified this plaintiff to further suspend operations under said contract on account of the proposed construction of the government canal known as the North Canal, referred to in said contract, but continued said contract in all its provisions and benefits, rights, and privileges, in everywise as the same was theretofore. And plaintiff has at all times since the commencement of the work upon said contract been ready to carry out the terms and conditions of said contract, and willing and prepared so to do, and would have done so within the time named in said contract if he had not been prevented from so doing by the aforesaid acts and omissions of said state of Washington; and plaintiff has at all times done and performed every requirement under said contract, on his part to be done and performed, to entitle him to the rights and benefits thereunder, and to perpetuate the lien upon said lands in question under said contract, as provided by a law and said contract; that immediately upon the execution of said contract, the contractors thereunder, to wit, William F. Hays and Frank Shay, demanded of the proper officials of the state of Washington, to wit, of the board of state land commissioners, upon whom was then devolved the function, power, and duty of the

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appraisement of said tide lands, that the tide lands contracted to be filled in by said described contract should be appraised forthwith as prescribed by the statute and the contract; that the said board failed and neglected to make the said appraisal, as required by law, and that, at various times since the execution of the contract, the demand and request for the said appraisement as required by law has been renewed and repeated by this plaintiff and by plaintiff and his assignor as hereinafter set up, and that said demands and requests have not been complied with, but that said board has failed and neglected at all times to make said appraisal; though at all such times promising so to do. That at various times since the first of January, 1903, this plaintiff has demanded and requested of defendants herein, acting and sitting as the board of state land commissioners, to appraise said lands as required by law, but that on the 24th day of October, 1903, and not before, the defendants peremptorily refused and still refuse to make the said appraisal as requested and demanded by this plaintiff. That the statute and contract of this plaintiff require that said land shall forthwith, upon the execution of the contract, be appraised at their actual value "at the time of the letting of such contract," and that this plaintiff may not with certainty or safety proceed to the excavation of the waterway provided in said contract until said lands shall have been so appraised as required by law."

The respondents demurred to the petition. Upon the hearing of this demurrer the following stipulation was filed:

"It is hereby stipulated by the parties that since the contract set forth in the petition herein was entered into, all the lands covered by said contract have been sold, disposed of and conveyed by the state to various persons and corporations in the manner provided by law."

Section 10 of the waterways act provides:

"If the commissioner of public lands shall determine to let any contract for the excavation of a waterway, as here-

inbefore provided, the tide land appraisers appointed in the county in which said tide lands lie, shall forthwith appraise the tide lands which it is proposed to fill in by the excavation of such waterway, at their actual value at the time of letting such contract, and the said lands so appraised shall never be disposed of by the state for less than such appraised value."

Petitioner argues that the statutory requirement is mandatory upon the appraisers to proceed to an immediate appraisement of the lands included in the contract, and that his lien cannot attach until such appraisement shall be made. Neither the act nor the contract makes the contractor's lien upon the lands dependent upon the appraisement thereof. Even if the statute should be held to be mandatory, we cannot agree that the failure to appraise the lands in any manner affects the contract, or any lien which petitioner may acquire, or other rights he may have thereunder. The object of section 10 clearly was to place a value upon the lands, below which they should not be sold, either to the contractor or to other persons. The act "does not contemplate a retention of the tide lands by the state until the contract for filling in is complied with. The state retained the right to sell its tide lands or lease its harbor areas. By the act in question there was reserved to the contractor a lien only on the lands filled in under such contract." *Hays v. Hill*, 23 Wash. 730, 63 Pac. 576. Section 4 of the act reserves a lien to the contractor who may fill in the lands, and, if such lands are not sold by the state within one year after improvements are made and certificates issued therefor, such certificate holders have an option, during the next succeeding six months, to purchase the lands improved, from the state "in the manner provided by the then existing laws for the sale of tide lands of the state." This option, of course, cannot inure to the bene-

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Syllabus.

fit of the petitioner, because the lands have already been sold by the state, and are now owned by other parties. When the lands are sold by the state, the remuneration of the contractor for lands filled in under his contract must necessarily come from a foreclosure of the liens as provided for in the act. The sale of the lands by the state simply removed the burden resting upon the contractor to buy the lands in order to protect his lien for filling above high tide. It follows that an appraisement of the lands would be of no avail to the relator.

The writ will therefore be denied.

FULLERTON, C. J., and HADLEY, DUNBAR and ANDERS, JJ., concur.

[No. 5259. Decided December 10, 1904.]

THE STATE OF WASHINGTON, *Respondent*, v. DAVID G.
WILLIAMS, *Appellant*.¹

CRIMINAL LAW—EVIDENCE OF IDENTITY—SUFFICIENCY—QUESTION FOR JURY. In a prosecution for assault with intent to murder, in which the prosecuting witness positively identifies the prisoner as the person who shot him, the question of identity was for the jury, although the prosecuting witness stated shortly after the shooting, upon accusing the prisoner, who thereupon became angry, that he might have been mistaken as it was dark.

CRIMINAL LAW—ASSAULT WITH INTENT TO KILL—INTENT NOT PRESUMED WHEN DEATH DOES NOT RESULT—INSTRUCTIONS. Upon a prosecution for assault with intent to kill, in which it appears that the prosecuting witness was shot in the hip, and death did not result, the intent to kill being an essential fact to be established by evidence and which can not be presumed as a matter of law, it is error to instruct that every person is presumed to intend the natural consequences of his acts, and that such presumption will always prevail unless the jury entertain a reasonable doubt as to the intent.

¹Reported in 78 Pac. 780.

SAME. For the same reason it is error to instruct that such shooting would have been murder in the first degree in case death had resulted, if the shot had been fired in the intent to perpetrate a robbery.

APPEAL AND ERROR—REVIEW—TRIAL—CONFLICTING INSTRUCTIONS—CURING ERROR. Where, of two conflicting instructions, it is impossible to determine which one the jury adopted, an erroneous instruction will not be held cured by a subsequent one correctly stating the law governing the subject.

Appeal from a judgment of the superior court for Yakima county, Rudkin, J., entered March 8, 1904, upon a conviction of the crime of assault with intent to kill. Reversed.

E. B. Preble, for appellant.

HADLEY, J.—Appellant was charged with the crime of assault with intent to commit murder. After a trial, a verdict of guilty as charged was returned, and judgment was entered thereon, whereby appellant was sentenced to serve a term of thirteen years' imprisonment in the state penitentiary. He has appealed from the judgment.

The material facts, as detailed by the prosecuting witness, were that he arrived at Toppenish in Yakima county, by freight train, about 11 o'clock P. M., October 18, 1903; that, after getting off the train at Toppenish, he was walking along the railway track when he met the appellant, a stranger to him, who engaged in conversation with him; that, after two or three minutes' conversation, the appellant drew a gun and said to the witness, in substance, that the best thing he could do was to hold up his hands; that the witness then ran toward the depot, when appellant shot him, the shot taking effect in the right hip; that, immediately after he was shot, the prosecuting witness ran to the depot and into the waiting

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room, and that, about five minutes afterward, the appellant came into the waiting room, sat down by the witness, and asked him how he got shot; that the witness then charged appellant with doing the shooting, whereupon the latter became angry, at which the witness said he might have been mistaken as it was dark; that there were four or five other persons in the depot when this conversation took place. It is conceded that the prosecuting witness was soon afterwards taken to a hotel, where a physician dressed the wound, and that appellant went into the room and said that the wounded man had accused him of doing the shooting, and that they could take him and lock him up; that, upon being told by those present that they did not wish to lock him up, he said he was camping near by, stating where the camp was located, and that he would go to the camp, stay there through the night, and return the next morning; that the landlord thereupon told him he would furnish him a bed, and that he could stay at the hotel, which offer he accepted; that the next morning, while he was yet asleep, the officers came to arrest him, and his arrest followed. There was testimony that appellant was heard to say that, if the prosecuting witness had not run, he would not have shot him. Appellant denied that he did the shooting, and also that he had made such statements. The prosecuting witness testified at the trial that appellant did the shooting.

One assignment of error is that the court should have set aside the verdict, and granted a new trial, for the reason that the evidence did not warrant the jury in finding, beyond a reasonable doubt, that the appellant is the person who shot the prosecuting witness. We think, under the evidence detailed above, that it became the province of the jury to determine that fact, and that no error

was committed in refusing to set aside the verdict for insufficiency of the evidence as to the identity of the person who did the shooting.

The more serious errors assigned relate to the instructions of the court. The state has filed no brief in the case, and we are, for that reason, deprived of the benefit of any suggestions or research on the part of respondent's counsel touching the questions involved. It will be remembered that appellant was charged with assault with intent to commit murder. The intent to commit murder was therefore an essential element of the crime charged. Such intent was a fact to be proved by the state and found by the jury. The intent to commit murder could not be presumed, as a matter of law, from the mere fact that an assault was committed which did not result in death. It is a fact, capable of being established by satisfactory proof, that one may shoot another, intending to disable him but without an intention to kill him, and when death does not result from the act, the presumption of law as to intent is in favor of the accused, and not against him. In this connection the court gave the following instruction:

"On the question of intent, I charge you that every person is presumed in law to intend the natural and necessary consequences of any act intentionally done. This presumption will always prevail unless the jury, from a consideration of all the circumstances of the particular case before them, entertain a reasonable doubt as to whether or not such intent did in fact exist."

The prosecuting witness was not murdered, and the above instruction as applied to the facts of this case, it seems to us, left the jury to understand that, as death might have resulted as the natural consequence of appellant's act, the law presumes that he intended that such

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consequence should follow. The instruction, furthermore, in effect states that such presumption of the existence of intent will always prevail unless overcome by circumstances which create a reasonable doubt in the minds of the jury. If death had resulted from the act of appellant, the instruction would have been applicable. But this court has held that such an instruction is inapplicable in a case of assault where death did not result, for the reason that, in such a case, the intent to murder can not be presumed as a matter of law, but must be established as any other fact. An instruction of similar import was held to be erroneous in *State v. Dolan*, 17 Wash. 499, 50 Pac. 472. At page 506 the court said:

"While the court correctly stated to the jury that the natural and probable consequences of every act deliberately done by a person of sound mind is presumed to have been intended, yet the rule of evidence so announced has no application to the case at bar. The rule applies only to offenses actually committed, i. e., to 'consequences' which really ensue, and not to those which do not ensue. *Roberts v. People*, 19 Mich. 409. The crime here charged consists of two essential elements; first, an assault, and second, a specific felonious intent to kill. Both these elements were alleged as facts in the information, and it was therefore incumbent upon the state to establish them *as facts* by competent evidence. And it was for the jury, and not the court, to determine the existence of both these facts. But the court by this charge invaded the province of the jury and assumed to draw the proper inferences from hypothetical facts stated, as a mere assumption of law. 'If,' as was said by the supreme court of Michigan in *Maher v. People*, 10 Mich. 218, 'courts could do this, juries might be required to find the fact of malice where they were satisfied from the whole evidence it did not exist.'"

In the light of the above decision and of authorities there cited, we think the instruction under examination here was erroneous.

The following instruction was also given:

"I further charge you that if you find, beyond a reasonable doubt, that the defendant fired the shot described in the information, if you find a shot was fired either in the perpetration or attempt to perpetrate a robbery and death had resulted, the killing would have been murder in the first degree, and no plea of accident or self defense can avail this defendant."

This instruction, it seems to us, is subject to the same criticism as the one already discussed. It is silent as to the necessity for the existence of actual intent, and in effect leaves the intent to be presumed as a matter of law, although death did not result. Had death resulted from the shooting while in the attempt to perpetrate a robbery, the law would have presumed that murder was intended, but, as we have seen, such a presumption does not arise as a matter of law when a mere assault has been committed which has not caused death.

Appellant urges that other instructions given are subject to the same criticism. We, however, think it is unnecessary to analyze them here. It is further urged that the errors above mentioned were not cured by other instructions given. The following was given:

"If you are satisfied beyond a reasonable doubt in this case that the defendant did, within three years prior to the filing of the information in this case, assault the prosecuting witness in manner and form as charged in the information, in the county of Yakima, state of Washington, and that he intended to commit the crime of murder as previously defined to you, it will be your duty to find him guilty as charged. If you find he committed the assault alleged but without intent to com-

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mit murder, you will find him guilty of assault. If you entertain a reasonable doubt as to whether or not he committed the assault alleged to have been committed in the information, or that he committed it with intent to commit murder, then it will be your duty to give the defendant the benefit of that doubt and acquit him."

It seems difficult to harmonize the above instruction with the theory of the others hereinbefore set out. They appear to be in conflict as to the law governing the question of intent, a vital one in the case. While the subject matter of the instruction, standing alone, may state the law correctly, yet it refers to previous ones given, and does not stand entirely alone. Our endeavor to reach the conclusion that it may cure the previous errors is, however, met with the seemingly irresistible objection that, of the two conflicting theories of the law embodied in the instructions, we are unable to determine which one the jury adopted and followed. That such errors are not cured by such an instruction as that above was held in the case of similar instructions where the charge was assault with intent to commit murder, in *People v. Mize*, 80 Cal. 41, 22 Pac. 80.

For the reasons stated, the judgment is reversed and the cause remanded with instructions to the trial court to grant a new trial.

FULLERTON, C. J., and ANDERS, DUNBAR, and MOUNT, JJ., concur.

[No. 5017. Decided December 12, 1904.]

R. W. BARTO, *Assignee, Appellant*, v. SARAH E.
STANLEY, *Respondent*.¹

APPEAL—REVIEW—STATEMENT OF FACTS. An order refusing to vacate the satisfaction of a judgment, made after a hearing, can not be reviewed on appeal where the facts on which it was based are not brought up by a statement of facts.

Appeal from an order of the superior court for King county, Morris, J., entered November 21, 1903, denying an application to cancel the satisfaction of a judgment, after a hearing before the court without a jury. Affirmed.

W. F. Hays, for appellant.

William Martin and *W. A. Keene*, for respondent.

PER CURIAM.—The appellant, being the assignee of a judgment against Sarah E. Stanley, satisfied the same of record on the payment to him of a sum of money less than the face of the judgment. Later on he applied to the court asking that the satisfaction be vacated, and that he have execution for the balance he claimed to be due on the judgment. A hearing was subsequently had on the application, at which the court refused to cancel the satisfaction entered, or to allow execution to issue for the balance claimed to be due. This appeal is taken from that order.

The order must be affirmed. The record on the part of the appellant consists merely of a transcript of the records of the lower court, which show the application, the order denying it, and the proceedings relating to

¹Reported in 78 Pac. 791.

the appeal. No attempt has been made to bring into this court the facts shown to the court on which the order appealed from is based, and, without this evidence before us, we cannot pass upon the correctness of the order. On the face of the record, the order was one which the trial court has power to make, and it is presumed to be regular, in the absence of a showing to the contrary. The order appealed from is affirmed.

[No. 5062. Decided December 12, 1904.]

GRAYS HARBOR BOOM COMPANY, *Respondent*, v. LYTLE
LOGGING & MERCANTILE COMPANY, *Appellant*.¹

LOGS AND LOGGING—LIENS FOR BOOMING—NOTICE—DESCRIPTION—SUFFICIENCY. The notice of a lien upon saw logs, for boomage charges, identifies the logs and is sufficient, when the logs are described as being of a certain number, branded in a certain way, and at a certain place, and the notice complies literally with the form prescribed by statute.

SAME—FORECLOSURE OF LIEN—DESTRUCTION OF PART OF PROPERTY BEFORE SUIT—FORECLOSURE AS TO BALANCE. An action to foreclose a lien on saw logs may be commenced after a portion of them have been made into lumber, and foreclosure may be decreed as to the existing portion.

SAME—JUDGMENT ESTABLISHING LIEN—MONEY IN COURT—IMPRESSING MONEY WITH LIEN—EQUITABLE POWERS OF COURT. Where money has been withheld by the purchasers of saw logs to the extent of liens claimed thereon, and, upon an action's being commenced to foreclose the liens, the purchasers bring the money into court, it is within the equitable powers of the court to impress the lien upon the money and order the same paid in discharge of the liens that are established.

SAME—DESTRUCTION OF PROPERTY BEFORE TRIAL—PERSONAL JUDGMENT AGAINST OWNER WITHOUT FORECLOSURE—APPLICATION OF MONEY IN COURT. In an action to foreclose a lien on saw logs where at the time of the trial the logs have been manufactured

¹Reported in 78 Pac. 795.

into lumber and their identity destroyed, the court can not order a foreclosure of the liens, but may enter judgment against the party liable for the amount due, and apply thereon any money in court impressed with the lien.

APPEAL AND ERROR—REVIEW—FINDINGS. Findings of the trial court will not be disturbed where the evidence is conflicting and evenly balanced.

Appeal from a judgment of the superior court for Chehalis county, Rice, J., entered April 23, 1903, upon findings in favor of the plaintiff, after a trial before the court without a jury, decreeing the foreclosure of liens upon sawlogs. Modified.

John C. Hogan and *J. H. Parker*, for appellant.

J. B. Bridges, *Ben Sheeks* and *E. H. Fox*, for respondent.

FULLERTON, C. J.—The respondent is a boom company, engaged in the business of booming, sorting, and rafting saw logs and other timber products, having its principal boom at the mouth of the Humptulips river, on Grays Harbor. In 1901 it boomed, sorted, and made into rafts certain saw logs belonging to the appellant for which services it charged its customary rates. These logs, when made into rafts, were forwarded by the company, pursuant to orders from the appellant, to the various lumber mills operating on Grays Harbor. Along with the rafts the company forwarded to the lumber companies a statement of its boomage charges, and the sums so claimed were withheld by the lumber companies, in their settlement with the appellant, from the purchase price of the logs. A dispute arose between the appellant and respondent as to the reasonableness of these boomage charges, and the lumber companies were notified not to pay over to the respondent the sums with-

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held by them from the appellant. The respondent thereupon filed liens on the various logs boomed, sorted, and made into rafts by it, and began actions to foreclose the same. These actions were four in number, but were consolidated on the order of the trial court, and tried as one. After the commencement of the actions, the lumber companies who had purchased the logs liened upon were made parties defendant. They all answered to the effect that their purchases had been made with the understanding that the respondent claimed a lien upon the logs in sums certain for boomage charges, and that they had withheld from the purchase price the amount of such claim. They thereupon paid the money into court, and asked that the court distribute it as the right to the same might appear. On the trial the court found that the amount due the respondent was the sum of \$2,942.26; that the amount paid into court, properly applicable to the satisfaction of the amount so found to be due, was \$2,147.88; and it was directed that this sum be paid respondent in part satisfaction of the amount due it, and that it have judgment of foreclosure against the logs liened upon for the balance. No costs were allowed either parties.

It is first complained that the court erred in refusing to hold the complaint and notices insufficient, on the ground that the description of the logs was too indefinite and uncertain to enable them to be identified with reasonable certainty, or identified at all. The liens described the logs as being a certain number, branded in a certain way, and located at or near a certain place. The liens complied literally with the form for such liens, prescribed by the statute, and we think were sufficient, under that provision of the code which prescribes that

no mistake or error in the statement of the demand or description of the property shall invalidate the lien, unless the court shall find that an innocent third party is injuriously affected thereby. See, § 5944, Bal. Code. In this case the question of the insufficiency of the description is raised by the party owing the debt for which the lien is claimed, and the statute applies with all its force.

It is next said that the court erred in refusing to dismiss the action at the conclusion of the respondent's case, because it then appeared that the logs sought to be levied upon had been cut into lumber and destroyed prior to the time of the commencement of the several actions, or the time of the commencement of any of them. While the evidence on this point is somewhat indefinite, we think it clearly appears that the major portion of the logs described in the liens were still intact at the time the several actions were filed. It was not necessary, of course, that the whole of them should be in existence. The lienor was entitled to foreclose upon such of them as then existed, even if it were true that a portion of the number originally liened upon had been destroyed.

The appellant next complains that the court erred in directing that the money, brought into court by the lumber companies, be paid in satisfaction of the amount found due the respondent, but we think this within the equitable powers of the court. The court, having acquired jurisdiction over the parties and the subject-matter of the controversy between the parties, could retain it for the purpose of doing justice between them, even to impressing a lien upon the money, withheld and paid into court, in lieu of the property upon which the respond-

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ent had a right of lien. *Bank of Stockham v. Alter*, 61 Neb. 359, 85 N. W. 300.

It is next contended that the court erred in directing a foreclosure of the liens, and directing a sale of the property covered by the liens. This contention we think must be sustained. The trial court, although it made no formal findings of fact, must have found that some of the logs described in the lien notices were in existence at the time of the trial, but we are unable to find anything in the record which supports such a finding. The evidence, to our minds, clearly shows that, at the time of the trial, the logs had been cut up into lumber and otherwise disposed of, so that identification of the logs themselves, or of their products, was impossible. In such a case it is, of course, an idle ceremony to direct a formal foreclosure, and the court erred in so doing. The fact that the logs were not in existence at the time of the trial, however, does not, as the appellant supposes, require a dismissal of the actions. The court, as we have said, having rightfully acquired jurisdiction of the actions, could retain it for the purpose of making a proper distribution of the money retained in lieu of the logs, and of entering a personal judgment against the appellant. It is not a case where the lien fails, but one where the conduct of the debtor and third person has made it impossible for the lienor to reap the full benefit of his rights, under the lien.

Lastly it is complained that the court erred in refusing to hold that the amount charged by the respondent for boomage services was unreasonable. On this point the evidence was conflicting, and, seemingly from the record, not unevenly balanced. Under such circumstances, we do not feel that the conclusion of the trial court ought to be disturbed.

Other questions suggested in the briefs we do not think merit separate consideration.

The judgment appealed from will be modified to the extent of striking therefrom all that part of it directing a foreclosure of the liens sued upon; in all other respects it will stand affirmed. Neither party will recover costs on this appeal.

HADLEY, MOUNT, DUNBAR, and ANDERS, JJ., concur.

[No. 5090. Decided December 12, 1904.]

F. J. GEHRES *et al.*, Respondents, v. JULIAN ORLOWSKI,
Appellant.¹

ATTACHMENT—DISSOLUTION. The dissolution of an attachment is within the discretion of the court.

PLEADINGS—ACTION ON NOTE—TOLLING STATUTE OF LIMITATIONS—PAYMENTS—PRESUMED TO BE MADE BY OBLIGORS. A complaint in an action upon a promissory note is not demurrable because it does not affirmatively allege that the payments relied upon to toll the statute of limitations were made or authorized by the obligors on the note, since the spirit of the code requires that to be presumed from the allegation specifying payments, and the fact that the payments were made by a stranger can be raised by answer.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered December 4, 1903, in favor of the plaintiffs, upon overruling a demurrer to the complaint. Affirmed.

Myers & Warren, for appellant.

George M. Ryker and *Martin & Grant*, for respondents.

DUNBAR, J.—This is an action upon a promissory note, brought by the respondents against the appellant

¹Reported in 78 Pac. 792.

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and co-obligor. Attachment was issued at the time of the commencement thereof. Appellant moved to discharge the attachment, and also demurred to the complaint. The motion to discharge the attachment, as well as the demurrer, was overruled and denied by the court. Thereupon appellant duly excepted, announced in open court that he would stand upon his demurrer and refused to further plead. Judgment was thereupon rendered against appellant, and from the order overruling the discharge of the attachment, and the judgment in this case, this appeal is taken.

The assignments of error are, that the court erred in refusing to discharge the attachment, in overruling the demurrer to the complaint, and in rendering the final judgment which it did render. From an investigation of the record we are not inclined to interfere with the discretion of the court in refusing to dissolve the attachment. The contention on the demurrer is that the statute of limitations had run against the note. It is conceded that, if the payments upon the note did not arrest the statute of limitations, the action was not commenced in time. After setting forth the note, signed Julius Orłowski and Marie H. Orłowski, the complaint proceeds:

"That said note is now in the possession and owned by the said Gehres & Hertrich, as such copartners (Gehres & Hertrich being the plaintiffs in the case). 3. That there has been nothing paid on said note except as follows: (setting forth the payments in order of their dates)."

It is contended by the appellant that, under the doctrine announced by this court in *Stubblefield v. McAuliff*, 20 Wash. 442, 55 Pac. 637, and *Bassett v. Thrall*, 21 Wash. 231, 57 Pac. 806, the complaint not alleging that the

appellant ever made any payments, as to him the note is barred. It is true that *Stubblefield v. McAuliff*, *supra*, it was held that, where a note secured by a mortgage of community realty has been executed by a man and wife, payments of principal or interest thereon, made by the husband without the authority of the wife, after maturity, will not extend the time of the running of the statute of limitations as against her. But in that case there was no question of pleadings involved. The fact was admitted that the payments were made only by the husband, part of which were made after the wife's death. And that was the principle which was followed in the subsequent case of *Bassett v. Thrall*, *supra*.

But appellant seems to rest securely upon the announcement by this court in *Perkins v. Jennings*, 27 Wash. 145, 67 Pac. 590—in which case the note was signed by two parties, Jennings and Schnurr—that, “In the absence of an averment that Schnurr did authorize the payment, and that he participated therein as his own act, the complaint must be held insufficient as to him.” This portion of the opinion, segregated from the general opinion, would undoubtedly bear out appellant's contention. But the language quoted in appellant's brief, which we have just reproduced, must be considered with reference to what is said before. In that case it was said:

“In behalf of respondent Schnurr it is urged that the action is barred because more than six years have elapsed since the maturity of the note, and that no allegation of the complaint shows that any payment was made by him after the note matured. As before stated, the original complaint made no allegation which showed by whom the payments were made; but the paper denominated a ‘bill of particulars,’ filed in response to the demand of respondents, does allege that the payment was made by

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Jennings, and, further, that 'plaintiff believes and, therefore alleges, with the knowledge and acquiescence of said defendant Joe Schnurr.' The above quoted words are all the allegations that in any way tend to connect respondent Schnurr with the payment. We do not think the averment shows any act on the part of Schnurr by way of participation in the payment. It is alleged that plaintiff believes the payment was made with the knowledge and acquiescence of Schnurr. To say that it was with his knowledge and acquiescence is not to say that he participated therein. Schnurr might have known that Jennings made a payment on his own behalf, and he might have acquiesced in his so doing, to the extent of not remonstrating with Jennings for making a payment which he had a right to make as his own."

Then follows the language above quoted. So that it affirmatively appeared in that case, from the bill of particulars, that Schnurr did not join in the payment, thereby bringing the case within the rule announced in *Stubblefield v. McAuliff*, *supra*.

While we do not wish to recede from the principle announced in those cases, we do not wish to extend the doctrine to the extent of holding that a pleading must affirmatively allege a payment on notes by the makers of the notes. It seems to us that it is in harmony with the spirit of our code, and of all pleading, to presume that the alleged payment was made by the obligors on the note, and not by a stranger to the contract, and, if such is not the case, it can be properly raised by answer. In *Shepard v. Calhoun*, 72 Ill. 337, it was held that payment, when indorsed on a promissory note, was presumed to be made by the maker; and in *Bell v. Campbell*, 123 Mo. 1, 25, S. W. 359, 45 Am. St. 505, that, while an indorsement of the payment of interest on a note is *prima facie* evidence that such payment was made by the maker, such presumption is rebutted by the testimony

of the maker to the contrary. It seems to us that this is the doctrine of reason, as well as of authority, and disposes of the appellant's contention in this regard.

The question of the amount of the judgment was not raised in the lower court, and will not be reviewed here.

The judgment is affirmed.

FULLERTON, C. J., and ANDERS, HADLEY, and MOUNT, JJ., concur.

[No. 5044. Decided December 12, 1904.]

CHARLES H. PLASS, *Appellant*, v. W. L. MORGAN,
Defendant, and L. A. METZGER, *Respondent*.¹

FRAUDULENT CONVEYANCES—SALES—STOCK OF GOODS IN BULK—STATUTES—CONSTRUCTION. Pierce's Code, § 5346, regulating the sale of "any stock of goods, wares, or merchandise in bulk," applies to a sale of all the goods, wares, and merchandise of a person engaged in conducting a boarding house and restaurant.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered September 30, 1903, dismissing a writ of garnishment, upon sustaining a demurrer to the controverting affidavit of the garnishee. Reversed.

F. S. Blattner, for appellant.

F. Campbell, for respondent.

DUNBAR, J.—Appellant commenced this action to recover a judgment against the defendant, and in such action caused a writ of garnishment to be served on the respondent, who answered that he had no property or effects belonging to the defendant. The plaintiff controverted said answer by the following affidavit:

¹Reported in 78 Pac. 784.

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"Charles H. Plass, being first duly sworn, on oath deposes and says: That he is not satisfied with the answer of the garnishee herein, and has good reason to believe and does believe that the answer of said garnishee is incorrect in this, that on the — day of March, 1903, the defendant herein was engaged in the business of conducting a boarding house and restaurant; that on said day the garnishee defendant herein purchased all the goods, wares, and merchandise in bulk of said defendant for cash, and paid the said defendant therefor; that said garnishee defendant, before paying said defendant, did not demand of and receive from said defendant a sworn statement containing the names and addresses of the creditors of said defendant, and did not pay, or see that the purchase money of said property or any part thereof was applied to the payment of, the bona fide claims of the creditors of said defendant; that said stock of goods, wares, and merchandise was at said time fairly and reasonably worth the sum of \$600; that at said time affiant was a creditor of said defendant for the sum sued upon herein, the same being on account of goods, wares, and merchandise sold and delivered to said defendant in the conduct of the aforesaid business."

The garnishee defendant demurred to the reply and affidavit of the plaintiff on the following grounds, to wit:

"(1) The said reply and affidavit does not state facts sufficient to controvert the answer of said L. A. Metzger, the garnishee in this case. (2) That it appears upon the face of said affidavit and reply that the law of 1901, applicable to the sale of merchandise in bulk, does not apply in this case."

This demurrer was sustained, the writ of garnishment dismissed, and the garnishee discharged, with judgment for costs. Judgment was entered in favor of the plaintiff, and against the defendant, for the sum of \$184. From the judgment of the court sustaining the demurrer and dismissing the garnishment proceeding, this appeal was taken.

So that the only question that is presented is whether or not § 5346, Pierce's Code, applies to a transaction of the kind set forth in the plaintiff's controverting affidavit. The section is as follows:

"It shall be the duty of every person who shall bargain for, or purchase any stock of goods, wares or merchandise in bulk, for cash, or on credit, before paying to the vendor, or his agent, or representative, or delivering to the vendor, or his agent, any part of the purchase price thereof, or any promissory note, or other evidence therefor, to demand of and receive from such vendor, or agent, . . . a written statement, sworn to substantially as hereinafter provided, of the names and addresses of all the creditors of said vendor, to whom said vendor may be indebted, together with the amount of the indebtedness due or owing, and to become due or owing, by said vendor to each of such creditors; and it shall be the duty of said vendor, or agent, to furnish such statement, which shall be verified by an oath . . .".

It is contended by the respondent that the law uses the special term "stock of merchandise," which, according to accepted English definitions, relates to the business of merchandising alone, and was clearly so intended by the legislature; that courts will not so construe the language of the statute as to make it include that which its plain and usual meaning will not import, or render its application absurd or ridiculous in its operation. The learned counsel, however, does not strictly quote the language of the statute. It does not use the special term "stocks of merchandise," but uses the term "any stock of goods, wares or merchandise in bulk." The word "any" is comprehensive and so is the word "stock." There is no limit placed by the legislature on the meaning of the word "stock." A stock of goods may mean, under the plain language of the statute, a great many different kinds of goods, different kinds of wares, or dif-

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ferent kinds of merchandise. It was the evident intent of the legislature to prevent the perpetration of fraud upon the creditors of people who are engaged in business, and, while there seems to be no authority submitted on this proposition, and none that we have been able to obtain, we do not see our way clear to exempt the defendant in this case from the liabilities imposed by this statute, or to deprive his creditors of the protection which it seems to guarantee to those who furnish goods to parties engaged in business. Section 5349 throws some light upon what the intention of the legislature was, where it is provided:

"Any sale or transfer of a stock of goods, wares or merchandise out of the usual or ordinary course of business or trade of the vendor, or whenever substantially the entire business or trade therefor conducted by the vendor, shall be sold or conveyed or whenever an interest in or to the business or trade of the vendor is sold or conveyed, or attempted to be sold or conveyed, shall be deemed a sale and transfer in bulk in contemplation of this act."

It seems to us, to give the construction to this statute that was placed upon it by the trial court, would be to limit the effect which was intended by the legislature in the passage of the act.

The judgment will be reversed, with instructions to overrule the demurrer to the controverting affidavit.

FULLERTON, C. J., and HADLEY, ANDERS, and MOUNT, JJ., concur.

[No. 5416. Decided December 12, 1904.]

THE STATE OF WASHINGTON, *on the Relation of Jefferson County, Plaintiff*, v. GEORGE C. HATCH, *as Judge etc., et al., Respondents.*¹

APPEAL AND ERROR—DECISION—JUDGMENT OF SUPREME COURT FOR COSTS—TAX FORECLOSURE PROCEDURE—EXECUTIONS. Where, upon an appeal from a tax foreclosure judgment, the supreme court affirms the judgment and enters a judgment for costs against the appellants and the sureties for a specified sum, and directs that execution issue therefor, the appellant is entitled to have execution issued out of the superior court for the collection of the costs, although the supreme court judgment does not in terms follow the direction of the statute as to the disposition of the funds deposited with the county treasurer, the same being applied by law and the order of the lower court as a credit on the tax judgment.

MANDAMUS — APPEAL — JUDGMENT — EXECUTION — REFUSAL OF LOWER COURT TO CARRY OUT DIRECTIONS OF SUPREME COURT—ADEQUACY OF REMEDY BY APPEAL. Mandamus lies to compel the judge of the superior court, who has quashed an execution for costs, directed by the supreme court on affirming a decision, to cause execution to issue therefor, since the remedy by appeal is neither speedy nor adequate to enforce the judgments of the supreme court after an appeal is once decided.

EXECUTIONS—POWER OF COURT—MANDAMUS. After a judge has quashed an execution to which a party is entitled, it can not be objected that mandamus will not lie to compel him to cause another to issue because such issuance is a ministerial duty of the clerk, as the court can control its executions.

MANDAMUS—DEMURRER—ISSUES OF FACT HOW RAISED. After an application for a writ of mandate has been submitted to the supreme court upon a demurrer in the application, the defendants are not entitled, upon the overruling of the demurrer, to leave to answer, as issues of fact must be presented at the time of the hearing, which is final.

Application to the supreme court, filed October 20, 1904, for a writ of mandate to require the superior court

¹Reported in 78 Pac. 796.

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for Jefferson county, Hatch, J., to cause an execution to issue. Writ granted.

A. W. Buddress, for relator.

John Trumbull, for respondents.

HADLEY, J.—In this cause original application was made in this court for a writ of mandate, directed to the superior court of Jefferson county, to the Hon. George C. Hatch, judge thereof, and to others named in the petition as co-respondents with said judge. Upon the face of the petition it appears, that the said superior court, in the year 1902, in a tax foreclosure suit brought by said Jefferson county, entered judgment of foreclosure against the several persons named as respondents herein, except the said judge; that an appeal from said judgment was prosecuted to this court, and that, in addition to the filing of the appeal bond, the appealing parties, as required by law, also deposited with the treasurer of Jefferson county a sum of money equal to the amount of the judgment rendered by the superior court, and the costs taxed therein, to wit, the sum of \$435.35; that thereafter this court rendered the following judgment on said appeal, to wit:

“This cause having been heretofore submitted to the court, upon the transcript of the record of the superior court of Jefferson county, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 9th day of June, A. D., 1904, on motion of A. W. Buddress, Esquire, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said superior court be, and the same is, hereby affirmed with costs, the petition for rehearing denied, and that the said county of Jefferson have and recover of and from the said John

Trumbull, V. L. Trumbull, T. F. Trumbull and L. P. Trumbull, and from C. A. Cushing and Fred A. Cook, sureties, the costs of this action, taxed and allowed at one hundred & six & 45-100 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in compliance with the opinion herein filed."

The petition further states, that, after the cause was remitted to the superior court under the above judgment, said court entered a supplemental judgment, directing the said county treasurer to apply the said sum of \$435.35, deposited with him as aforesaid, to the payment of the judgment rendered in the foreclosure proceeding; that thereafter an execution was issued out of said superior court against the parties who appealed to this court, for the collection of said \$106.45, the amount of the judgment for costs rendered by this court; that afterwards the superior court quashed said execution, on the ground that the remittitur of this court did not support it; that thereupon the relator here duly moved the said court to direct the issuance of another execution for the collection of said costs, in accordance with the remittitur of this court, but that said court refused to grant said motion, or to direct the issuance of any execution, and that said costs have not been paid. The respondents demurred to the petition, the said George C. Hatch, as judge aforesaid, appearing separately, and the remaining respondents joined in a demurrer. The demurrers challenged the petition as not stating facts sufficient to authorize the issuance of a writ of mandate, or the granting of any relief.

The petition discloses that it was the theory of the respondent judge that the judgment and remittitur of this court did not authorize the issuance of an execution for the costs. We are unable to see it so. The judgment

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clearly states the amount of the costs; that Jefferson county shall recover the same from the appellants in the action, and also from their sureties, specifically naming them all, and adds further, "that execution issue therefor." The judgment also concludes as follows: "And it is further ordered that this cause be remitted to said superior court for further proceedings in compliance with the opinion herein filed." The opinion, to which reference is made in the judgment, as well as the judgment, also showed that the judgment below was affirmed, which statement of itself awarded the costs to the respondent in the appeal, in the absence of other specific direction. But the judgment went further than the opinion, and expressly stated that costs should be recovered, giving the amount thereof, and that execution should issue therefor. It is thus clear that the judgment of this court directed the issuance of execution for the costs, and that the cause was remitted to the superior court for the further proceedings which necessarily included the collection of the costs, under the terms of the judgment. Whatever may be said of the lack of fullness and regularity of the judgment of this court, under the terms of § 4, p. 74, *et seq.*, Laws of 1903, it does direct that execution shall issue for the costs, as that statute directs. While the judgment in terms does not follow the statute in directing the disposition of the funds deposited with the county treasurer, yet, as the petition shows, the superior court has already acted in that matter, and has done what this court, under the statute, should have specifically directed in its judgment, viz., has applied the amount deposited with the treasurer as a credit upon the tax foreclosure judgment. While not specifically directed by this court, yet no complaint is made here that the lower court ordered the doing of that which the law manifestly intended should have

been done, but that portion of the judgment which it seems to us is specific and unequivocal, the petition states the said judge declines to carry out. This court had jurisdiction of the parties, and of the subject matter on the appeal, and was authorized by law to enter judgment for costs of the appeal. Whatever may be said as to its regularity, it was not void, and it therefore became the duty of the trial court to direct its enforcement.

Respondents contend that the writ of mandate will not lie, for the reason that the relator has a remedy by appeal from the order of the trial court quashing the execution, and also from its refusal to issue another execution, as moved by the relator. We deem it unnecessary to pass upon the appealability of said orders, in view of the fact that the relator has not chosen the remedy of appeal. It is sufficient to say that we do not think such remedy would have been speedy and adequate, under the circumstances, within the meaning of § 5756, Bal. Code, which authorizes the writ of mandate in the absence of "a plain, speedy, and adequate remedy in the ordinary course of law." The respondents had once appealed, and the relator had been awarded the judgment of this court for its costs, with ample direction to the lower court to use its process for their collection. If the relator should be compelled to appeal again, in order to get the aid of the necessary process, the same thing might have to be repeated, and the end of the litigation would thus be far removed. We think the refusal to carry out the direction of this court in its judgment, viz., that the lower court shall cause execution to issue for the collection of the costs on appeal, should be reached in a more direct way than through another appeal, and that the writ of mandate is the proper remedy. *Schnepper v. Whiting* (S. D.), 99 N. W. 84; *State ex rel. Bradbury v. Thomp-*

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son (Neb.), 95 N. W. 47; *State ex rel. Sanchez v. Call*, 36 Fla. 305, 18 South. 771; *State ex rel. Board v. Judge*, 48 La. Ann. 664, 2 South. 215; *Koonce v. Doolittle*, 48 W. Va. 592, 37 S. E. 644; *State ex rel. Horton v. Dickinson*, 63 Neb. 869, 89 N. W. 431; *American etc. Placer Co. v. Rich* (Idaho), 69 Pac. 280.

The further argument is made by respondents that the issuance of an execution is the ministerial duty of the clerk of the lower court, and that the judge has no duty in connection therewith, which can be the subject of mandatory direction. The petition shows that the court has quashed one execution which the clerk did issue, and has refused to direct the issuance of another. The court controls its own process and the clerk issues executions under its direction. When the court itself, the source of authority, refuses to direct an execution which has been commanded by an appellate tribunal, he is refusing to perform an act which is enjoined upon him as a duty resulting from his office, within the terms of § 5755, Bal. Code. The demurrers to the petition are therefore overruled.

At the hearing respondents requested that in the event the demurrer should be overruled they should then be accorded the privilege of answering the petition. The hearing however came on regularly upon notice and was therefore final. It is the practice at the hearing of original applications in this court to hear arguments challenging the sufficiency of the petitions, and such challenges are usually raised in the record by filing demurrers. But the cases are at the same time before the court to be heard for all purposes, and if respondents desire to raise any issue on the facts, they must do so by answer filed along with the demurrer, and the two must be submitted at the

same time. This cause is therefore now before us for final disposition.

For the reasons hereinbefore stated, we think the relator is entitled to the writ of mandate asked, and it is ordered that the same issue.

ANDERS, DUNBAR, and MOUNT, JJ., concur.

[No. 4863. Decided December 12, 1904.]

CARL WASMUND *et al.*, *Appellants*, v. CHRIS HARM *et al.*,
Respondents.¹

ADVERSE POSSESSION—EASEMENTS—RIGHT OF WAY—PRESCRIPTIVE PERIOD FOLLOWS STATUTE. An easement of a right of way across the lands of another, in favor of an adjoining owner, may be acquired by adverse user for the period of limitations for quieting title to lands.

SAME—PLEADINGS—ANSWER—VARIANCE—AMENDMENTS. In an action to enjoin trespass, an answer setting up a right of way by prescription, by adverse user for twenty years, does not limit the proof to user for twenty years, since the easement by prescription may be acquired by ten years' adverse use, and no amendment of the pleadings is called for.

SAME—USE OF WAY WHEN ADVERSE—EVIDENCE—SUFFICIENCY. Upon an issue as to whether the use of a right of way across the adjoining farm lands of another was adverse or merely permissive, the trial court's finding of adverse use is sustained by evidence to the effect that the users found the way open when they purchased their lands, that it was the sole means of access thereto, that, after some years, the lands subject to the use, which had been uninclosed, were fenced by the owner, who requested the users to erect gates, which was done, although there is conflict in the testimony as to the gates, the owner claiming that he required the users to erect gates or submit to the closing of the road.

SAME—INTENT HOW SHOWN. In such a case the fact that the users of the road did not, in giving their testimony, positively declare that their use was adverse, does not affect the weight of the evidence, since their intent can be better shown by acts than by declarations.

¹Reported in 78 Pac. 777.

36	170
37	123
137	221
36	170
41	569

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Citations of Counsel.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered July 25, 1903, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to enjoin trespassing. Affirmed.

Hudson & Holt, for appellants. Where there is no statutory limitation applicable to incorporeal hereditaments like the easement in this case, the common law rule of twenty years prevails. Washburn, Easements (2d. ed.), 106; *Tracy v. Atherton*, 36 Vt. 512; *Louisville etc. R. Co. v. Hays*, 11 Lea (Tenn.) 382, 47 Am. Rep. 291; *Ferrell v. Ferrell*, 60 Tenn. 329; *Clafflin v. Boston etc. R. Co.*, 157 Mass. 489, 32 N. E. 659, 20 L. R. A. 638; *Cooper v. Smith*, 9 Serg. & R. 26, 11 Am. Dec. 658; *Crawford v. Neff*, 3 Grant's Cas. 175; *Cox v. Forrest*, 60 Md. 74; *Blanchard v. Moulton*, 63 Me. 434. The use in this case was not of such a character as would ripen into an easement. *Simms v. Davis*, Cheves Law (S. C.) 1, 34 Am. Dec. 581; *Coburn v. San Mateo County*, 75 Fed. 520. Use under a claim of right is essential. *Thomas v. England*, 71 Cal. 456, 12 Pac. 491; *Shell v. Poulson*, 23 Wash. 535, 63 Pac. 204; *Megrath v. Nickerson*, 24 Wash. 235, 64 Pac. 163; *Shellhouse v. State*, 110 Ind. 509, 11 N. E. 484; *Dexter v. Tree*, 117 Ill. 532, 6 N. E. 510; *Hall v. McLeod*, 2 Met. (Ky.) 102; *Harkness v. Woodmansee*, 7 Utah 227, 26 Pac. 292; *Town of Brushy Mound v. McClintock*, 150 Ill. 129, 36 N. E. 976; *Warren v. President etc.*, 15 Ill. 241; *Ferrell v. Ferrell*, *supra*; *Hill v. Hagaman*, 84 Ind. 290; *Parish v. Caspar*, 109 Ind. 586, 10 N. E. 109; *Funk v. Anderson*, 22 Utah 238, 61 Pac. 1006; *Center Creek etc. Co., v. Lindsay*, 21 Utah 192, 60 Pac. 559; *Yeager v. Wood-*

ruff, 17 Utah 361, 53 Pac. 1046. The statute of limitations for the recovery of real estate has no application to incorporeal hereditaments and is applied by analogy only, in which case all the requirements of the local statute must be met. *Harkness v. Woodmansee*, *Funk v. Anderson* and *Cooper v. Smith*, *supra*. Where the use of a road is permissive in its inception, there must be some positive conduct to indicate a change in the character of its use, brought to the knowledge of the owner of the soil, especially where the land is uninclosed. *Ball v. Kehl*, 95 Cal. 606, 30 Pac. 780; *Yeager v. Woodruff* and *Hill v. Hagaman*, *supra*; *Patterson v. Griffith*, 23 Ky. L. 334, 62 S. W. 884. In the case of uninclosed lands, strong evidence should be required, and mere use unexplained is not sufficient. *Chisolm v. Caines*, 67 Fed. 296; *Trump v. McDonnell*, 120 Ala. 200, 24 South. 353; *M'Kee v. Garrett*, 1 Bailey 341; *Watt v. Trapp*, 2 Rich. Law 136. The erection of gates without objection, was a recognition of the permissive character of the use of the road. *Thomas v. England*, *supra*; *Calvin v. Burnett*, 17 Wend. 569. Harm commenced the use of a road which had been constructed by others for their use under an express license from appellant, and, having succeeded to their interests, his continuation of the use with others was merely the enjoyment of a right granted to another, which the owner of the soil permitted others to enjoy, and was not in any sense adverse; commencing as it did, it created no easement in his behalf. *Kilburn v. Adams*, 7 Met. 23, 39 Am. Dec. 754; *Davis v. Brigham*, 29 Me. 391; *Day v. Allender*, 22 Md. 529; *Smith v. Higbee*, 12 Vt. 113; Washburn, Easements (4th ed.), pp. 164-6, §§ 44-46.

Frederick H. Murray and *H. C. Colburn*, for respondents.

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Opinion Per FULLERTON, C. J.

FULLERTON, C. J.—On July 2, 1878, the Northern Pacific Railway Company, being then the owner of a part of the southeast quarter of section 1, in township 19, north, of range 4, east of the Willamette Meridian, conveyed the same to one Isaac W. Anderson, reserving to itself a strip 400 feet wide extending northerly through the same near the center thereof, being a strip 200 feet in width on each side of its railway track. In December, 1881, Anderson conveyed, by warranty deed and without reservation of any kind, all the land lying on the east side of the railroad to the appellant Carl Wasmund, and on September 28, 1882, conveyed the part on the west side of the track to one T. J. Green. Green, in January, 1885, conveyed some 25 acres off the north end of the tract to one G. W. Holt, and in January, 1887, conveyed the remainder to the respondent, Chris Harm. Holt in February, 1888, conveyed the tract deeded to him to one James A. Johnson, who, on the 27th of December, 1889, conveyed the same to Harm.

By these conveyances the respondents, as a community, became the owners of all the original tract owned by Anderson which lay west of the railroad. At the time of these several conveyances, the only county road accessible to any part of the land was one crossing the railway track some distance south of the south boundary of section 1, and extending in a northeasterly direction, crossing the same at or near its southeast corner. It will be seen, therefore, that, when Anderson conveyed the tract lying east of the railroad to the appellants, it cut off the remainder from the road, leaving it landlocked in so far as access to the public highways was concerned. Anderson, while he continued to own the isolated tract, seems to have gained access thereto from the road by passing through the orchard and meadow of the appellants; and

Green, while he owned it, gained access thereto in the same way. Holt, after his purchase, opened up, by permission of the appellants, an old logging road, which extended from a point on the county road near the southeast corner of section 1, westerly across the appellants' land to the railroad, and used this way during the time he continued to hold the 25 acres he purchased from Green. Johnson used the same way after he purchased from Holt, paying the appellants a small consideration for the privilege.

The respondents settled upon the tract purchased by them from Anderson in 1887. They found the road that Holt had opened still in use, and the only means of reaching the public highway from the lands they had recently purchased. They immediately began the use of the road, and, from thence to the time of the commencement of this action in December, 1902, used it continuously. The appellants' land across which it ran was then uninclosed. It remained so until about the year 1895, when the appellants, being desirous of fencing it, asked the respondents to insert posts on the side of the road where they wished to have their gates. These posts were put in by the respondents at once. Later, when the appellants informed them that they had completed the fence, they put in gates, which they have continued to maintain ever since. There was, however, no interruption of their use of the way during any of the times mentioned.

In December, 1902, the appellants served notice upon the respondent purporting to revoke any license they might have to use the way, and forbidding them to make further use of the same in any manner. The respondents, nevertheless, continued in their use of the way, whereupon this action was brought to restrain them from so doing. To the complaint for an injunction, the respondents answered, justifying their use of the way on two

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grounds: first, that they were entitled to its use as a way of necessity; and, second, that they had a right of way by reason of an adverse user of the same for over ten years. On the trial the court found against the claim of a right of way of necessity, but held that the respondents had a right of way by adverse user. Judgment was entered in accordance with the finding, and this appeal is taken therefrom.

The principle question, and the only one we have found it necessary to discuss, is, have the respondents acquired a right to a way by adverse user across the appellants' premises? The appellants contend they have not, for several reasons, the first of which is that, conceding the user to have been adverse and otherwise sufficient to ripen into an easement in time, the use has not been continued for the required period. They argue that, inasmuch as there is no special statute of limitations in this state applicable to incorporeal hereditaments, the rule of the common law must be applied, and that this rule fixed the period at twenty years. But we think counsel are mistaken in assuming that the prescriptive period under the common law was twenty years. Strictly speaking, it was not. Under the common law, to acquire an easement in the land of another by adverse user, the use must have continued from a time when the memory of man ran not to the contrary, and it was only by analogy to the statute of 21 Jac. 1, ch. 16, requiring writs for the recovery of real property to be "sued out within twenty years next after the title and cause of action had first descended or fallen," that the English courts held that twenty years' use and enjoyment of an easement was sufficient evidence of the possession of a prescriptive right. Later on the matter was regulated in England by statute. In the United States, however, the courts have generally fol-

lowed the doctrine of the English courts, rather than the rule of the common law; and it is now the prevailing rule that the prescriptive period for the acquisition of an easement corresponds with the local period of limitations for quieting title to lands. Washburn's Easements and Servitudes (4th ed.), p. 148, par. 24; Angell on Limitations, § 4, Note 2; 22 Am. & Eng. Enc. Law (2d ed.), 1212. "In general, it is the policy of the courts of law to limit the presumption of grants to periods analogous to those of the statute of limitations, in cases where the statute does not apply." *Ricard v. Williams*, 7 Wheat. 110. This rule seems consonant with the better reason, and we feel constrained to follow it. Applying it to the case before us, it is at once apparent that the way in question here has been in use by the respondents for the full statutory period, the same having been in use by the respondents from about the middle of the year 1887 to the end of the year 1902.

In this connection it is well to notice the further contention of the appellants that the respondents are estopped from claiming that adverse use for any number of years less than twenty will establish a way by prescription, because of the manner in which the issue was framed in the pleadings. The respondents, in answer to the appellants' complaint, claimed a right of way by prescription, alleging that they had used the way in question for a period of twenty years. These allegations were denied in the reply. The argument is that a litigant is bound by the theory of his pleadings, and cannot recover, even if his proofs may warrant a recovery, if such proofs do not correspond with such theory. But the rule is not so onerous as this. Mistakes in pleadings may always be amended to correspond with the proofs, and an appellate court will never deny a litigant the benefit of his proofs because of a

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variance between them and the allegations of his pleadings, unless, perhaps, in a case where he has been called upon to amend, and has refused. The case before us is not such a case. It may be questioned, we think, whether there was even a variance, but certain it is that the respondent was never called upon to amend his pleadings.

It is next said that the use of the way by the respondents was not of such a character as will ripen into an easement. It is not denied, of course, that one may acquire an easement of right of way over the land of another by user for the required time, but it is contended that the user must possess certain characteristics which are wanting in the proofs of the use shown here. Doubtless, to establish a right of way by user, it is necessary to show that the use has been continuous, uninterrupted, adverse to the owner of the land over which the way is claimed, and with the knowledge of such owner, and while he was able, in law, to assert and enforce his rights. It is necessary, also, in order to gain a prescriptive right of way across the land of another by user, that the use be over a uniform route, and if used over one route one year and another the next, it would not establish a right of way.

But that the proofs here show a compliance with the principal part of these requisites, there can be no serious doubt. It was shown that the use was continuous, uninterrupted, uniform as to route, and that the owners had knowledge of the use made of the way, and were at all times competent, legally, to assert their rights. Whether the use was adverse to the owners, or permissive, only, is the sole question on which there is any real dispute, and on this we think the weight of the evidence is with the finding of the trial court. The respondents found the way open and in use when they entered upon the land in 1887. Since that time this road has been the sole means of in-

gress and egress to and from their farm. So far as the record discloses, they have never sought to procure another way, although their farm was landlocked without this way, and its closing would effectually cut them off from the public highways. Moreover, as we read the testimony, there has been no question as to their right to the way. It is true there is a dispute as to what occurred when the gates were put in—the appellants' testimony being to the effect that the respondents were told to put in gates or submit to the closing of the way, while the respondents testify that a request was made of them to put in the gates, and that they complied with the request, and that there was nothing said which even intimated that their right to the way was permissive only—but it seems to us that the respondents' version of that circumstance is more consonant with the then relation of the parties than is the more harsh version given by the appellants. At any rate, there was no interruption of, or attempt to interrupt the respondents' use of, the way, and this, to our minds, is strong evidence that the parties thought that the way was being used as a matter of right, rather than as a matter of grace.

Counsel for the appellants base another objection upon the fact that the respondent who testified did not, while on the witness stand, state that his use of the way had been adverse, insisting apparently that some positive declarations are necessary in order to show the character of the use to which the way is put. But it would seem that such statements could have but little weight. Where the inquiry is as to the intent of a person at a particular time, such intent is better made known by his conduct at the time in question, than by his subsequent declarations as to what his intent then was. The examination of the respondent was directed to ascertain his intent from his

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Statement of Case.

conduct, and it seems to us that it matters little that he was not asked the direct question concerning his intent while using the way.

The finding to the effect that the respondents have a right of way by prescription across the appellants' land is in accord with the weight of the evidence, and the judgment appealed from will stand affirmed.

HADLEY, MOUNT, DUNBAR, and ANDERS, JJ., concur.

[No. 4886. Decided December 13, 1904.]

A. EKLUND *et al.*, Respondents, v. JAMES HOPKINS *et al.*,
*Appellants.*¹

FRAUDULENT CONVEYANCES—SALES OF STOCK OF GOODS IN BULK—LIST OF CREDITORS—GENERAL AND SPECIAL CREDITORS—STATUTES—CONSTRUCTION. LAWS 1901, p. 222, requiring the purchaser of a stock of goods in bulk to demand a list of all the vendor's creditors, and prescribing a form of affidavit to be made by the vendor which shall specify all his creditors, with the amount of the indebtedness, and further specifying that no creditors holding claims for goods sold or money loaned to carry on the business have been omitted from the list, is intended to protect all creditors, and a sale without complying with the statute is void as to general creditors, since the last clause of the affidavit relating to a special class can not change the scope of the statute expressly applying to all creditors.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered May 4, 1903, upon setting aside the verdict of a jury rendered in favor of the defendants by direction of the court and granting a new trial, in an action of claim and delivery for goods levied upon. Reversed.

John A. Pierce, for appellants.

Roche & Onstein, for respondents.

¹Reported in 78 Pac. 787.

MOUNT, J.—In March, 1903, one Ernest Eklund was conducting a second hand store in Spokane. On the 26th day of March he sold his business, and the whole of the goods, wares, and merchandise in stock, to respondents, without attempting to comply with the act of 1901 relating to the sale and transfer of goods, wares, and merchandise in bulk. At that time Ernest Eklund was indebted to appellant Hopkins for services as an attorney at law. After the sale, Hopkins obtained a judgment against Ernest Eklund in the justice court. An execution was issued upon this judgment, and placed in the hands of appellant Saling, a constable, for service. Saling levied upon the stock of goods and merchandise. Thereupon respondents claimed the goods under the provisions of § 6661, Bal. Code. Thereafter a trial was had before a justice of the peace, who found against the claimants, and in favor of the appellants.

Subsequently the respondents appealed to the superior court of Spokane county, where a trial of the same issues was had before the court and a jury. The superior court, after hearing the claimants' evidence, directed a verdict in favor of appellants, on the ground that the sale of the goods by Ernest Eklund to respondents was void. Subsequently the superior court, upon motion of respondents, granted a new trial, upon the ground that the appellant Hopkins was a general creditor of said Ernest Eklund, and not a creditor on account of goods, wares, and merchandise, purchased by said Ernest Eklund, or on account of money borrowed to carry on the business of which said goods were a part. This appeal is prosecuted from the order granting a new trial.

The only real question presented is whether the act of 1901 (Laws 1901, p. 222), relating to the purchase, sale and transfer of stocks of goods, wares, and merchandise

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in bulk, applies only to certain creditors, or applies to all the creditors of the vendor alike. Respondents argue, and the lower court held, that the act applies only to those creditors "for or on account of goods, wares, or merchandise purchased upon credit, or on account of money borrowed to carry on the business." Section 1 of this act provides:

"It shall be the duty of every person who shall . . . purchase any stock of goods, wares or merchandise in bulk . . . to demand of and receive from such vendor . . . a written statement, sworn to substantially as hereinafter provided, of the names and addresses of all the creditors of said vendor, to whom said vendor may be indebted, together with the amount of the indebtedness due . . . each of such creditors; and it shall be the duty of said vendor, or agent, to furnish such statement, which shall be verified by an oath to the following effect:

"State of Washington, County of _____, ss: Before me personally appeared _____ (vendor, or agent, as the case may be), who being by me first duly sworn upon his oath doth depose and say that the foregoing statement contains the names of all of the creditors of _____ (the name of the vendor), together with their addresses, and that the amount set opposite each of said respective names is the amount now due and owing, and which shall become due and owing by _____ (vendor) to such creditors, and that there are no creditors holding claims due, or which shall become due for or on account of goods, wares or merchandise purchased upon credit or on account of money borrowed to carry on the business of which said goods are a part, other than as set forth in said statement, and in this affidavit, are within the personal knowledge of affiant.

"Subscribed and sworn to before me this ____ day of _____, 190—."

Section 2 provides that whenever any person shall purchase any stock of goods without having first received

from the vendor the statement provided for, and without paying or seeing to it that the purchase money is applied to the payment of the bona fide claims of creditors of the vendor, as shown on said statement, share and share alike, such sale shall be fraudulent and void. Section 3 provides that any vendor of any stock of goods, who shall knowingly or wilfully make a statement which shall not include the names of all the creditors of said vendor, with the aggregate amount due and to become due each of them, shall be deemed guilty of perjury.

It seems perfectly clear that this act requires a statement by the vendor of "*all the creditors.*" There is no distinction made in the act between classes of creditors, unless it is found in the form of the oath which the act provides must be attached to the statement. The latter part of the oath requires the vendor to say "and that there are no creditors holding claims due, or which shall become due for or on account of goods, wares or merchandise purchased upon credit or on account of money borrowed to carry on the business of which said goods are a part, other than as set forth in said statement." This language in the form of the verification cannot be held to change the scope of the statute, where the intention of the act is clearly to include *all creditors* without distinction and treat them all alike. The first part of the oath requires the vendor to say that the statement contains the names of *all the creditors* of the vendor. The object of this act was, no doubt, to protect wholesale merchants particularly against fraudulent sales by retailers; but the act by its terms protects all creditors of merchants alike. *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947. The evident purpose of the last clause of the verification above referred to was to emphasize the fact that the list or

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statement to which it was attached contained the names of all the creditors, and that there were no creditors of particular classes left out. This clause adds nothing to the facts stated previously in the verification, and it takes nothing away; it simply confuses. The lower court was, no doubt, misled as to the meaning of the act by this language in the verification, and for that reason granted a new trial. The verdict was, we think, properly directed upon the facts, for the reason that the act applies to *all the creditors* of the vendor of stocks of merchandise in bulk.

The order granting a new trial is therefore reversed, and the cause remanded with instructions to the lower court to enter a judgment upon the verdict in favor of the appellants.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

[No. 4868. Decided December 13, 1904.]

WILLIAM A. DUNN *et al.*, Appellants, v. KEMP &
HEBERT *et al.*, Respondents.¹

NEGLIGENCE—DANGEROUS PREMISES—FALL DOWN A STAIRWAY IN A STORE—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT. In an action for personal injuries sustained by a customer in a store in falling down a stairway, a verdict for the defendants is properly directed when it appears from the plaintiff's evidence that she fell down the entrance to an ordinary stairway, which was protected on all sides except the entrance, and which was not in the main aisle of the store, that it was light and within twenty feet of windows, and there were lights in the basement, and that plaintiff was wearing darkened glasses to protect her eyes from the light, and could have seen the stairway if she had looked down.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered July 8, 1903, upon the

¹Reported in 78 Pac. 782.

verdict of a jury rendered in favor of the defendants, by direction of the court, in an action for personal injuries sustained in falling down a stairway. Affirmed.

James Dawson, and *Nash & Nash*, for appellants.

Danson & Huneke, for respondents.

MOUNT, J.—Appellants brought this action against respondents to recover damages for personal injuries. The negligence alleged in the complaint is that the respondents, who were merchants, carelessly and negligently maintained an open and unguarded hatchway on the main floor of their store building, where persons entering and using said store for the purposes of trading therein were liable to fall into said hatchway. It is then alleged that appellant Eva L. Dunn, on December 21, 1902, while in said store building for the purpose of dealing with said respondents, fell through said hatchway to the basement beneath, breaking her right arm, and otherwise bruising her. The answer of the defendants denied the allegations of the complaint, and alleged contributory negligence on the part of said Eva L. Dunn. When appellants had introduced all their evidence, the lower court, upon motion of respondents, directed a verdict in favor of respondents. From this order the plaintiffs appeal.

The only question presented on this appeal arises upon the evidence and is, did the court err in holding that the plaintiffs' evidence showed no negligence of defendants, but did show contributory negligence on the part of appellant? The evidence shows that respondents' store building is one hundred and twenty feet long, north and south, by one hundred feet wide, east and west. The entrance is at the south. Near the north end of the store, a stairway four feet wide leads from the main floor to the basement. This stairway faces west, while the main aisle

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of the store runs north and south. At each side of the stairway, railings are provided, terminating at newel posts on each side of the entrance to the stairway. Tables were placed along each of the railings surrounding the stairway, except at the entrance, which was open. On the day of the accident, plaintiff Eva L. Dunn entered the store and told one of the clerks that she wanted to see some waists. She was directed to go around to the next counter. She went around to the next counter and saw no waists, but, looking past the stairway, saw some waists, and started to go to them, when she walked into the stairway and fell to a landing some six feet down the stairway. She was wearing colored glasses at the time, to protect her eyes from the light. She says she could have seen the stairway if she had looked down. She was looking ahead of her and did not see it.

We have carefully read over the evidence, and we think no negligence whatever on the part of respondents is shown. The stairway was an ordinary stairway, protected on both sides by railings and tables next thereto. It was not in the main aisle of the store, but was crosswise thereto, so that a person intending to enter the stairway must turn at right angles from the aisle. It is not negligence *per se* to maintain a stairway in a store or public place (*Larkin v. O'Neill*, 119 N. Y. 221, 23 N. E. 563); and yet this is the only negligence which from the evidence can reasonably be claimed. There appears to be nothing unusual or dangerous about the stairway or its construction. No man of ordinary prudence would suppose that any one, possessed of his natural faculties, would fall down it in the daytime. It is true, appellant says it was dark at the stairway, but she was wearing darkened glasses. Other witnesses state it was light there; that the stairway was within twenty feet of win-

dows; that it was broad daylight, being about 1:30 in the afternoon at the time of the accident. There were lights in the basement. Appellant could readily see and distinguish waists some distance past the stairway. But, conceding that the stairway was dark, it is shown that she was in the light, and, according to her own statement, could see past the stairway and distinguish goods beyond, and could have seen the stairway if she had looked. It passes comprehension that, under the circumstances shown, one could in the light walk up to the stairway, turn at right angles, and fall down it, without being negligent. We think the court properly granted the motion upon both the grounds stated.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

[No. 5089. Decided December 13, 1904.]

ALEX McNAIR *et al.*, Appellants, v. M. INGEBRIGTSEN
et al., Respondents.¹

COMMUNITY PROPERTY—LIENS—FORECLOSURE—WIFE NECESSARY PARTY. The wife is a necessary party to an action brought by a city to foreclose a local assessment lien upon community real estate.

SAME—QUIETING TITLE—ACTION TO SET ASIDE FORECLOSURE SALE—PARTIES—COMPLAINT—SUFFICIENCY. The complaint in an action to remove the cloud of a local assessment foreclosure sale and deed is insufficient where it appears that the property was community property and that the wife was not made a party to the foreclosure; and neither the hardship of requiring a city to name the wife, where the record title stands in the name of the husband and the parties are nonresidents, nor the fact that the wife had filed no community property claim, can be urged where the complaint fails to show nonresidence, and alleges that the community character of the land was known to the city.

¹Reported in 78 Pac. 789.

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Opinion Per DUNBAR, J.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered February 1, 1904, upon sustaining a demurrer to the complaint, in an action to quiet title. Reversed.

John C. Hogan, for appellants.

Wm. O. McKinlay, for respondents.

DUNBAR, J.—The complaint alleges in substance, that the appellants are husband and wife; that, while such husband and wife, on August 6, 1892, they became owners by purchase of a parcel of land situated in Aberdeen, and particularly described in the complaint, which property thereupon became and afterwards remained the community property of appellants; that, upon the 24th of November, 1900, the city of Aberdeen, a municipal corporation of the third class, commenced an action in the superior court of Chehalis county for the foreclosure of an alleged local assessment lien for street improvements on this lot, for the sum of \$3.81; that thereafter, on the 29th day of January, 1901, the superior court of Chehalis county entered a pretended judgment and decree of foreclosure and sale, in said entitled action, and that thereafter, on the 16th day of November, 1901, the sheriff of Chehalis county, pursuant to a pretended execution issued out of said court upon said decree and judgment, made a pretended sale of the real estate of plaintiffs hereinbefore described, to the defendant in this action, and issued to him a pretended certificate of sale; and that thereafter the sheriff executed a pretended sheriff's deed, purporting to convey to him the lands of the plaintiffs hereinbefore described, which said deed was filed in the auditor's office of Chehalis county, and constitutes a cloud upon the title of plaintiffs, in and to said real estate described; that in said action the sole

defendant was the husband, Alex McNair, his wife not having been made a party; alleges the tender to defendant of the taxes paid. A demurrer was interposed to this complaint, which was sustained by the court, upon the ground that the same did not state facts sufficient to constitute a cause of action. The plaintiffs electing to stand upon their complaint, judgment was entered. From such judgment this appeal was prosecuted.

Appellants urge two contentions in this case; first, that the alleged sale was void, and that the court acted without jurisdiction, for the reason that the wife, Almeda Jane McNair, was not made a party to the action; and, secondly, that the record of the former case shows that the attempted service by publication on Alex McNair was illegal and void, and insufficient to confer jurisdiction on the court. We think this contention is hypercritical, and that the affidavit of the attorney for the plaintiffs shows a substantial compliance with the provisions of the statute in relation to service by mail. But, on the first proposition, it has been uniformly held by this court that the wife is a proper and necessary party to the foreclosure of liens against community real estate, commencing with *Littell & Smythe Mfg. Co. v. Miller*, 3 Wash. 480, 28 Pac. 1035, which was followed by many subsequent cases, until finally the question was put at rest in *Seattle v. Baxter*, 20 Wash. 714, 55 Pac. 320, by the following terse statement:

"The second question is whether a wife is a necessary party to an action brought to foreclose an assessment lien. The affirmative of this question is too well settled in this state to admit of present discussion,"
citing prior cases.

It is contended by the respondents that the plaintiffs in this action, at the time of the prior action, were non-

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residents; that the record title was in the husband; that the authorities had no way of ascertaining whether the property was community property or not and no way of ascertaining whether or not the plaintiff McNair was a married man; and that, therefore, in such cases it would be impossible for a municipality to foreclose liens for street assessments, if the burden were imposed upon it of making service upon an unknown person. If this state of facts appeared in the case, it might be that it would bring the action within the rule announced in *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030, and that the wife might be estopped from urging her interest in the real estate. And the same might be said, in a case of this kind, of the other proposition urged by the respondents, that it was the duty of the wife to comply with the provisions of § 3892, Pierce's Code, which provides that a husband or wife, having an interest in real estate by virtue of the marriage relation, the legal title of record to which real estate is or shall be held by the other, may protect such interest by causing to be filed and recorded, in the auditor's office of the county in which such real estate is situated, an instrument in writing, setting forth that the person filing such instrument is the husband or wife, as the case may be, of the person holding the legal title to the real estate in question, etc. But these questions are not raised in this case, the court sustaining a demurrer to the complaint, which does not set forth the facts constituting the hardship complained of by the respondents. It does not even appear from the complaint that the plaintiffs were non-residents at the time of the foreclosure proceedings; while on the question of the knowledge of the municipality of the community character of the estate, it is specially alleged in the complaint that said real estate was at all

times the community property of these plaintiffs, which fact was known to the defendants herein, and to the said city of Aberdeen, and its attorney, or could, upon reasonable diligence, have been ascertained.

We think the court erred in sustaining the demurrer to the complaint, and the judgment will, therefore, be reversed, with instructions to the trial court to overrule said demurrer.

FULLERTON, C. J., and ANDERS, MOUNT, and HADLEY, JJ., concur.

[No. 5020. Decided December 13, 1904.]

JAMES S. GRANT, *Appellant*, v. MICHAEL M. WALSH,
Respondent.¹

PLEADINGS—ACTION ON CONTRACT OR FOR CONVERSION—COMPLAINT—PLEADING AND PROOF—NONSUIT. Where a complaint sets forth a contract whereby the defendant agreed to organize a corporation and deliver to plaintiff a certain number of shares of the stock in payment for a mining claim, and alleges that, after full performance by the plaintiff, the defendant refused to deliver the stock, but caused the shares to be issued to himself, and there is sufficient evidence that the defendant violated such contract by failing to deliver the stock, it is error to grant a nonsuit on the theory that the action was for a conversion of the stock, there having been no evidence that the defendant had received the shares himself; since, under the code, the complaint is but a plain statement of the facts, and it alleges a violation of the contract in the defendant's failure to make payment as agreed upon.

ASSIGNMENT—ACTIONS—PARTIES. The assignee of the rights of parties entitled under a contract to certain shares of stock may bring an action in his own name for a violation of the contract.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered July 3, 1903, upon granting

¹Reported in 78 Pac. 786.

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a nonsuit at the close of plaintiff's case, after a trial before the court and a jury, in an action on contract. Reversed.

B. C. Mosby, for appellant.

H. S. Stoolfire and John C. Kleber, for respondent.

DUNBAR, J.—This is an action by the appellant, who was locator and owner of the Buckhorn mining claim, situated in Okanogan county, state of Washington, upon a written agreement entered into between the appellant and the respondent, the respondent acting as trustee for certain other parties referred to in the agreement, viz., Patrick Donley, Gustavus A. Hutchinson, and John J. Stephens. The paper writing or agreement referred to is in the words and figures following:

“Escrow Deed. Jas. Grant to M. M. Walsh.

“To Republic Bank.

“ $1\frac{1}{2}$ in. in Buckhorn M. claim, Myers Ck., Okanogan Co., Wash. Consideration \$200—to be paid to said Grant on receipt by this bank of a satisfactory abstract of title to said mining claim, then this deed to be delivered to said Walsh; he is to incorporate the said Buckhorn Mining claim; the capital stock of said incorporation is not to exceed 1,000,000 shares of the par value of \$1 per share, non-assessable; 150,000 shares of said capital stock is to be delivered to the said Jas. S. Grant as soon as corporation is complete; not less than 300,000 shares of said stock to be placed as Treasury stock for the exclusive benefit of the corporation; the remainder of the stock to be divided equal between said Walsh and other owners other than said Grant; in case all agreements above mentioned are not well and truly carried out by said parties, then this deed to be void and of no effect.

“Witness: J. H. Hughes. (Signed) M. M. Walsh.

“June 20th, 1898.

James S. Grant.”

The complaint alleges, that the abstract was furnished and the deed delivered; that subsequently the defendant, together with the other owners of said mining claim, in lieu of incorporating a company to take over said claim, conveyed to a company already incorporated, namely, the Monterey Gold Mining Company, the whole of said Buckhorn mining claim; to all of which the plaintiff consented as a virtual compliance with and performance of said agreement requiring the defendant to incorporate said company; that the said Monterey Gold Mining Company was then, and is now, incorporated under the laws of the state of Washington, with a capital stock of 1,000,000 shares, with a par value of \$1 per share, and non-assessable. It is alleged, that 150,000 shares of the stock of said company were delivered to the plaintiff herein in his own right; that 300,000, and no more, shares of the stock of said company were placed and retained in the company treasury for the exclusive benefit of the said corporation; that the other owners of the Buckhorn mining claim, who are alluded to in said agreement, were, besides the defendant himself, only John J. Stephens, Gustavus A. Hutchinson, and Patrick Donley; that the balance of shares of said stock, to be equally divided among the other said owners, including the defendant, was 550,000 shares; that there was actually divided among the aforesaid Stevens, Hutchinson, and Donley, and to them delivered in compliance with the terms of said agreement, altogether but 262,500 shares of the stock of the said Monterey Gold Mining Company; that the defendant, without authority, caused to be issued and delivered to himself the entire remaining amount of said stock, namely, 287,500 shares; and it is alleged that, of the 550,000 shares to be equally divided as aforesaid, there remained undivided and unde-

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livered to said Stephens, Hutchinson, and Donley, a balance of 150,000 shares; that the interests of the said Hutchinson, Stephens, and Donley to the undivided shares were duly assigned for a valuable consideration to the plaintiff; that all of the precedent conditions of the aforesaid agreement, which were to be performed by the plaintiff, have been by him performed; that the defendant, though often requested to execute the said agreement by delivering and transferring to the plaintiff, as assignee of said Donley, Stephens, and Hutchinson, the balance of the shares of stock stipulated for in the agreement aforesaid, had wantonly and wrongfully refused to make such delivery and transfer; alleging damages for such detention.

The complaint is too long to set forth in this opinion, but the substantial and material portions of the complaint are as quoted above. We are referring now to the second amended complaint. The answer substantially denies the allegations of the complaint; denies that the stock of the Monterey Gold Mining Company was of any value whatever; denies that the paper writing set forth in the complaint was an agreement between the parties to the action, but alleges that it was only a partial memorandum of the actual agreement, which was a verbal agreement, and was entered into only for the purpose of governing the action of the Republic Bank, in making the delivery of the deed by Grant to the defendant, for the undivided interest owned by said Grant in said Buckhorn mining claim; and alleges that the said Hutchinson, Stephens, and Donley had no interest, either legal or equitable, in the 287,000 shares mentioned in the complaint; that they had no interest, either legal or equitable, in the one-half interest in said claim which plaintiff transferred to defendant, nor did they or either of them pay any part of

the consideration for which plaintiff transferred to defendant the said one-half interest in the said claim; nor was the said paper writing made for their benefit or either of them; nor did they or either of them ever transfer any property to the defendant or the said company, as a compliance with its terms; but that all demands of the plaintiff as to the purchase of the said half interest in the said claim, and of said agreement and paper writing, were fully satisfied by the delivery to the plaintiff by the defendant of \$200 in cash, and by the transfer to the plaintiff by the defendant of 150,000 shares of the stock in the Monterey Gold Mining Company; and that the plaintiff received the same as full settlement of the said agreement and paper writing; and that every condition of the agreement entered into between the plaintiff and the defendant had been performed by the defendant.

The reply denied the affirmative matter of the answer. The answer and reply are, also, long and circumstantial, but upon these material issues the case went to trial. After the introduction of the testimony of the plaintiff, the defendant moved for a nonsuit, on the ground of insufficiency of the evidence to sustain the plaintiff's complaint. This motion was granted by the court, on the theory that the action was an action for conversion, and that it had not been shown that the stock was, or had been, in the possession of the defendant. Judgment was entered in favor of the defendant for costs, and this appeal is prosecuted from such judgment.

We think the court erred in sustaining the motion for nonsuit. Under the provisions of our code, a complaint is a plain statement of the facts upon which the plaintiff relies for relief. The facts, as stated in this complaint, are that an agreement was entered into between the plain-

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tiff and the defendant, which agreement bound the defendant to incorporate a company, issue 150,000 shares to the plaintiff, deposit 300,000 shares as treasury stock, and to issue the balance of the 1,000,000 shares, which was to be the amount of the shares, equally between the defendant and the other owners, who were, according to the plaintiff's contention, Donley, Hutchinson, and Stephens; and, according to the allegations of the complaint, this agreement had only been partially performed, and 287,000 of the shares, which were to have been issued to the respondent and the others mentioned, had not been issued. It is true that the complaint alleges that the respondent had these shares issued to himself, and it is also true that there was no proof to sustain this allegation. But the other allegation of the complaint—that the plaintiff had refused to carry out the conditions of the contract by refusing to issue this stock to the parties to whom, under the agreement, it was to have been issued—is a good allegation of violation of the contract. If the defendant had neglected or refused to have issued to the plaintiff the 150,000 shares of stock which the contract provided should be delivered to the plaintiff, there is no question but that the plaintiff would have had an action against the defendant for a violation of his contract; and he could not have had an action against the corporation, for he had no contractual relations with the corporation, his contract being exclusively with the defendant. The other parties to the contract, namely, Stephens, Hutchinson, and Donley, would have had the same right of action against the defendant, if the amount of shares which he agreed to issue to them had not been issued in accordance with the agreement. The assignment of their right to these shares to this plaintiff carried with it all the rights that the assignors

had against the defendant; hence, he had a right to bring this action on the assigned claims against the defendant for a violation of the contract.

We think there was sufficient testimony offered by the plaintiff, which if uncontradicted, would have sustained a judgment against the defendant for violating his contract. That being true, there was sufficient to submit to the jury, and the judgment will therefore be reversed, with instructions to try the issues on the pleadings as finally settled by the trial court.

FULLERTON, C. J., and ANDERS, MOUNT, and HADLEY, JJ., concur.

[No. 5428 Decided December 15, 1904.]

THE STATE OF WASHINGTON, *on the Relation of John Anderson, Plaintiff*, v. W. R. BELL, *as Judge of the Superior Court for King County, Respondent*.¹

APPEAL AND ERROR—EFFECT OF SUPERSEDEAS ON APPEAL FROM APPOINTMENT OF RECEIVER—MANDAMUS. An appeal from an order appointing a receiver, with a supersedeas bond given, does not affect the trial of the case on the merits, and mandamus will lie to compel the judge of the superior court to set the case for trial in its regular course where he refuses to do so on account of such an appeal.

Application to the supreme court, filed November 14, 1904, for a writ of mandate to compel the superior court for King county, Bell, J., to set a cause for trial. Writ granted.

A. A. Anderson and Tucker & Hyland, for relator.
Allen, Allen & Stratton, for respondent.

¹Reported in 78 Pac. 908.

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Opinion Per Curiam.

PER CURIAM.—This action was brought by the relator against W. R. Bell, judge of the superior court of the state of Washington in and for King county, to require him to set for trial a case pending in that court, entitled M. A. Redding, plaintiff, v. John Anderson, defendant. On the 12th day of August, 1904, the respondent, upon a hearing upon affidavits in response to an order to show cause, appointed a receiver of the property known as the North Star Lumber Company, in which the plaintiff in said action claimed to be a partner with the defendant John Anderson, as is set forth in the affidavit and petition for the writ herein. After such appointment the relator set the case for trial, and, upon the day of trial, the court refused to hear it, on the ground that an appeal had been prosecuted from the order appointing a receiver, and a supersedeas bond given; and held that the only thing for him to try was the accounting, and that he would try nothing until the determination of the appeal from the order appointing a receiver.

Under the doctrine announced by this court in *State ex rel. Sanglin v. Superior Court*, 30 Wash. 232, 70 Pac. 484, and under the plain provisions of the statute, the parties should have the privilege of a trial upon the merits of a case, with a right to have witnesses sworn, examined, and cross-examined, regardless of the fact that an appeal had been prosecuted from the order made by the court upon the trial by affidavits. The court, in its return to the alternative writ, indicates that an additional reason for not trying the case was the fact that the docket of the court was congested with business. But it also appears plainly from the return that, in any event, the court was of the opinion that the cause should not be tried during the pendency of the appeal. Of course, it is not the province or the intention of this writ to

compel the court to hear the cause out of its regular order, nor to displace other business of the court which would naturally have preference over this case. But the writ will issue in accordance with the petition and the cause will be tried in its due course.

[No. 5008. Decided December 15, 1904.]

J. P. O. LOWNSDALE *et al.*, *Respondents and Cross-Appellants*, v. GRAYS HARBOR BOOM COMPANY,
Appellant.¹

TRIAL—INSTRUCTIONS—COMMENT ON FACTS. Where the evidence upon an issue of fact is clear and undisputed, the court may direct a verdict thereon, and an instruction stating the established facts is not within the constitutional inhibition against commenting upon the facts.

SAME—STATEMENT OF REASONS FOR INSTRUCTIONS—HARMLESS ERROR. An instruction to the jury that the plaintiffs had, upon one of their causes of action, waived all claims except for nominal damages because of the difficulty of determining the exact amount, is not an unlawful comment on the facts by reason of stating the reasons for the waiver, and, if error at all, it was without prejudice.

EJECTMENT—DAMAGES FOR DETENTION—RENTAL VALUE—INSTRUCTIONS. In an action to recover damages for the unlawful detention of land, an instruction upon the measure of damages stating that the rental value is to be determined with reference to the uses to which the lands are suitable, "or such as may be reasonably expected in the immediate future," would be error if intended to authorize the determination of past rental value by its future rental value; but when, from the context of the whole instruction, such expression evidently referred to the beginning of defendant's occupancy, and not to rental value in the future, the same is not erroneous.

APPEAL AND ERROR—NUISANCE—INSTRUCTIONS—HARMLESS ERROR—ISSUES FOUND IN FAVOR OF APPELLANT. In an action for damages to land unlawfully detained, and for an injunction to

¹Reported in 78 Pac. 904.

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Statement of Case.

abate a nuisance, which was tried to a jury, instructions to the jury upon the subject of the nuisance are not prejudicial to the defendant where the jury failed to find that defendant was maintaining a nuisance and the cause of action therefor was dismissed.

WATERS—NAVIGATION—LOGS AND LOGGING—RIPARIAN RIGHTS—USE OF BANKS OF STREAM ABOVE HIGH TIDE. The right of floatage of logs down a navigable stream does not carry with it a right to the use of the banks above the line of high tide, but only to the use of the highway at all stages of the water.

APPEAL AND ERROR—INSTRUCTIONS—DAMAGES—HARMLESS ERROR—ISSUES FOUND IN FAVOR OF APPELLANT. Error in an instruction on the subject of damages for obstructing a river is not prejudicial, where the jury found no damages against appellant upon that branch of the case.

APPEAL AND ERROR—REVIEW—HARMLESS ERROR—INCOMPETENT EVIDENCE UPON ESTABLISHED FACT. Where plaintiffs' title depended upon a state contract, the admission in evidence of an incompetent certificate of the state land commissioner to the effect that all payments had been made and that it was in full force, is harmless error when the fact had been established by competent evidence, and was not denied by any evidence on the part of the defendant.

APPEAL—REVIEW—VERDICT—EXCESSIVE DAMAGES. A verdict for the rental value of land will not be set aside as excessive, when there was evidence to justify it, although it reaches the extreme limit.

WATERS — NUISANCE — OBSTRUCTION TO NAVIGATION — USE OF STREAM FOR BOOMING LOGS. It is not error to refuse to find a nuisance in the obstruction of navigation by a boom company, where it does not appear at the time of the trial that there are any logs in the river, and where the defendant was an incorporated boom company and its use of the stream was a lawful use under the statute.

Cross-appeals from a judgment of the superior court for Chehalis county, Rice, J., entered July 10, 1903, upon the special verdict of a jury rendered in favor of the plaintiff for damages for the detention of land, and refusing to find that the defendant was maintaining a public nuisance. Affirmed.

E. H. Fox, Ben Sheeks, and J. B. Bridges, for appellant.

J. C. Cross and J. W. Robinson, for respondents and cross-appellants.

MOUNT, J.—This action was brought by the plaintiffs to recover from defendant certain lands, and for damages thereto, and for rent, and for the abatement of an alleged nuisance. The allegations of the complaint are substantially as follows: That the plaintiffs are husband and wife; that on the 7th day of September, 1893, they were, and ever since have been, the owners of the southeast quarter of section 16, township 18 north, of range 11 west of the Willamette Meridian, with the appurtenances; that during all of said time they have been in possession of, or entitled to the possession of, said premises, together with such shore lands and shore rights as are a part of, and contiguous to, the property above described, and upon and within the Humptulips river and the slough within said lands; that the Humptulips river is a navigable stream for many miles inland, and that the tide ebbs and flows in the river within plaintiffs' property; that the river empties into Gray's Harbor; that a large slough extends inland from the said river through plaintiffs' property; and that the river and slough are valuable for the rafting, sorting, and booming of saw logs and other timber; that the banks of the river and slough within plaintiffs' lands are such as to furnish protection to logs and timber stored therein.

They allege, further, that on December 8, 1893, the plaintiffs owned certain improvements consisting of houses, piles, and other structures, on and along the banks of said river and slough; that, on or about the said day, the defendant unlawfully and wrongfully

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entered upon, and took possession of, portions of plaintiffs' premises aforesaid, adjoining and abutting upon the said river and slough within plaintiffs' lands, and their improvements, together with the banks, shore lands, shore lines, and shore rights belonging thereto, and appropriated the same to its own use, and to the exclusion of the plaintiffs.

As specifying the damages suffered, plaintiffs allege \$800 to be a reasonable sum for the use and occupation of the premises by the defendant for the year ending January 1, 1898; \$1,100 for the use and occupation of the premises for the year ending January 1, 1899; \$1,400 for the use and occupation of the premises for the year ending January 1, 1900; \$1,500 for the use and occupation of the premises for the year ending January 1, 1901; and \$1,500 for the year ending January 1, 1902; and \$1,500 from January 1, 1902, to the commencement of the action.

Plaintiffs allege that, after taking possession of plaintiffs' property, defendant had driven and constructed along and against the banks of the river, upon plaintiffs' premises, certain piles connecting these piles with boom sticks and chains, forming a boom; and that, at all times since wrongfully and unlawfully taking possession, and at the date of the commencement of this action, the defendant boom company was using the west bank, and a large part of the east bank of the river, and both banks of the large slough in plaintiffs' premises, above the line of mean high tide, as the sides of defendant's boom. Plaintiffs further allege that defendant's boom, constructed as aforesaid, caused the currents of the river to shift, and to wash away large portions of plaintiffs' lands, and form large gravel beds and sandbars in front of plaintiffs' property, and divert the

stream from its natural channel within the boundaries of plaintiffs' lands; that defendant had cut, deepened, opened, and extended a shallow slough, within plaintiffs' lands, so that the water in the Humptulips river was turned into this slough, and was cutting a channel across plaintiffs' lands, so as to greatly damage the lands.

As a basis for injunctive relief, they allege, in addition to what is above stated, that the boom company so constructed its boom within the river and slough, and so used the river and slough in the catching and holding of saw logs within plaintiffs' premises, as to completely obstruct the river and slough from bank to bank, for many months at a time during said term of years; that the effect of such obstruction was to prevent the use of the river or slough as a public highway, and to prevent the plaintiffs, or any one else, from using the said river or slough for floatage, and to render plaintiffs' premises inaccessible by water, and that, by reason thereof, plaintiffs had been wholly shut off from their lands, and deprived of the use of the river and slough during the term of years mentioned in the complaint; that the defendant had thereby created and maintained, and was maintaining, a nuisance in a public highway, within the boundaries of plaintiffs' land, to the special injury of plaintiffs.

The defendant, Grays Harbor Boom Company, in answer, admits its corporate existence; that the Humptulips river is a navigable stream; and that it enters into Gray's Harbor at or near the south line of the lands described in plaintiffs' complaint; that the large slough described in the complaint is a navigable slough, and that the river and slough within plaintiffs' lands are valuable for booming, rafting, floating, and storing logs; that there are many million feet of timber along the

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banks of the Humptulips river, and in the territory tributary to such river, above plaintiffs' lands; that plaintiffs owned, and now own, a house on the lands described in their complaint, used by the defendant, and that it has at all times refused to pay plaintiffs any rental or damages on their alleged causes of action. The defendant admits, also, that it has constructed, maintained, and operated a boom in the river and slough, and has used the river and slough within the boundaries of the lands claimed by the plaintiffs; but denies that it has damaged the banks of plaintiffs' lands in any manner whatever; denies that it has used the plaintiffs' lands or premises, and denies that plaintiffs are entitled to recover from defendant damages on account of the use and occupation, or on account of erosions, or any other account; and denies that it has constructed or operated its boom, or used the river or slough, in such manner as to obstruct navigation or to exclude plaintiffs from the use of their lands; and denies that its boom constitutes a nuisance.

As a further defense, defendant alleges, in effect, that it is a corporation, organized and existing under and by virtue of the laws of the state of Washington with reference to boom companies; that it has and exercises all the rights with which boom companies are clothed in this state by virtue of such incorporation, and that whatever it has done on said river or slough has been done as a boom company, and that it has constructed, maintained, and operated its boom, and used the river and slough, skillfully and with due care, and without negligence, and without injury or damage to any of the rights of plaintiffs or their lands; that no change has been made in the channel of the river by reason of the defendant's boom or its operation. Plaintiffs, in their

reply to defendant's answer, deny generally the new matters contained in the answer. Upon the issues thus formed, a trial was had and a verdict rendered by the jury as follows:

"We, the jury in the above entitled cause, hereby find for the plaintiffs as follows: (1) That plaintiffs are entitled to the possession of the property described in the complaint above the line of mean high tide. (2) For damages for the use and occupation of said lands above the line of mean high tide for the sum of \$3,000. (3) For damages for erosions and washing away of the banks of said lands above the line of mean high tide in the nominal sum of \$1.00. (4) We find for the plaintiffs, and that the defendant, Grays Harbor Boom Company, has obstructed navigation in the large slough during a part of the year. (5) We find that the Humptulips river has not been obstructed to navigation."

Subsequently the court entered the following judgment in the cause:

"It is ordered and adjudged and decreed by the court that the plaintiffs herein, J. P. O. Lownsdale and Sarah R. Lownsdale, do have and recover of the defendant, Grays Harbor Boom Company, a corporation, the sum of three thousand and one dollars (\$3,001.00), and costs of suit taxed at \$105.25, with interest thereon from the date hereof at the rate of 6 per cent per annum, and that they, plaintiffs, have execution therefor. It is further adjudged by the court that the plaintiffs herein, J. P. O. Lownsdale and Sarah R. Lownsdale, take nothing in this action in the way of possession or restitution of the property described in their complaint, and that the said plaintiffs take nothing herein by way of injunctive relief; that all other relief except as to recovery in damages be denied."

From that part of the judgment relating to plaintiffs' damages and costs, the boom company has appealed, and from that part of the judgment denying to plaintiffs

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possession or restitution of the property, and equitable relief by way of injunction, the plaintiffs have appealed.

Appellant boom company first contends that the trial court erred in giving instructions numbered 11 and 12, as follows:

"You are instructed that, by reason of the contracts between the state of Washington and Lownsdale and Baccus, these plaintiffs have been, since the date thereof, and are now, lawfully entitled to the possession of all the lands described in each of the said contracts. You are further instructed that these plaintiffs are entitled to the possession of the lands described in the contracts they hold with the state of Washington for the southeast quarter of section 16, township 18 north, of range 11 west of the Willamette Meridian, including the banks of the said river and said slough, above the line of mean high tide, and your verdict should be for the plaintiffs for the possession thereof."

It is argued that these instructions are a comment on the facts. It is true that the pleadings made an issue of fact upon the right of possession of plaintiffs to these lands; but plaintiffs' evidence was clear and undisputed upon these questions, so that they became facts established in the case, and the court was therefore authorized to direct a verdict accordingly. The constitutional inhibition against judges commenting upon the facts refers only to disputed facts, and not to those concerning which there is no dispute, and which are admitted in the case. As to admitted facts, or those established without contradiction, courts are at liberty to state them to the jury. The instructions were, therefore, not erroneous.

It is claimed that the court erred in giving the following instructions:

"With reference to the second cause of action herein, in which the plaintiffs have claimed \$3,500 damages for erosions and washing away of the banks of the lands de-

scribed in the complaint, the court instructs you that the plaintiffs, in open court, announced that, owing to the fact that they were unable to establish by competent proof the amount of damages in dollars and cents therefor, and that because of the difficulties and impossibilities of determining the exact damages in dollars and cents, they have waived their right to recover anything but a nominal sum for such damages. And you are instructed that, as a matter of law upon the evidence in this case, the plaintiffs can recover of the defendant only nominal damages, if any, for injury to their lands described in the complaint on account of erosions and the washing away of the banks of the plaintiffs' lands above the line of mean high tide. And by nominal damages is meant some small sum, such as one dollar."

Counsel concede that, if there had been no other cause of action, this instruction would have been without prejudice; but it is argued that, because the court stated the reason of the waiver of this cause of action except for nominal damages, this statement was prejudicial. It was not necessary for the court to state his reason to the jury for giving the instruction, but we think the statement did not amount to a comment upon the facts in the case, and that it could have had no prejudicial effect upon the defendant's case. If error at all, it was without prejudice.

It is also argued that the court erred in embracing in its charge upon the measure of rental value the following language: "or such as may be reasonably expected in the immediate future." If the court intended, by this language, to tell the jury that they might consider the immediate future rental value of the land, in order to arrive at its past rental value, the instruction was undoubtedly wrong, because past rental value of lands is not determined by its future value, or what may be reasonably expected in the immediate future. Past

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value is capable of accurate determination, and must be found without reference to its future value. The whole instruction containing the language complained of is as follows:

"The court instructs you further that, as a matter of law, where a person wrongfully takes possession of another person's lands and premises against the will of the owner or the person entitled to the possession thereof, the person taking possession under such circumstances is liable in damages to the person owning the lands or entitled to the possession thereof, and the measure of damages under such circumstances is the amount of the injury which may be done to the premises by such wrongful taking or withholding of the possession of the premises, and in addition thereto, a reasonable rental value of the premises during the time of such detention; and in determining the question of reasonable rental value for the use and occupation of property, such as is involved in this action, you are instructed that the same considerations are to be regarded as in a sale between private parties, the rule in such cases being, what, from their availability for valuable uses, are the lands reasonably worth in the market, and compensation to the owner in the way of damages for use and occupation of his lands and premises under the conditions I have just stated, is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business of the community, or such as may be reasonably expected in the immediate future. Where the catching, holding, sorting, and rafting of logs in a river is a regular business, the adaptability of lands or premises, in connection with the banks of the river and boom to hold logs in safety, is a proper element for consideration in estimating the value of the uses of the lands or the banks, when such lands or such banks have been appropriated by a third person for a public or private use. And if you believe from the evidence in this case under the instructions given you, that the plaintiffs were the owners of, or entitled to the possession of, the

lands in controversy in this action, and they were possessed of the same, or that they were entitled to the possession of the same, and that, while in such possession or while entitled to such possession, the defendant in this action wrongfully took possession of the lands in question in this action, or any part thereof, and pursuant to such wrongful taking the said defendant continued to withhold the possession of the said lands belonging to these plaintiffs and embraced in this action, then and in that event, the said defendant would be liable to the plaintiffs for any damages that they may have done to the premises, and in addition thereto they would be liable to the plaintiffs in a sum equal to and measured by the reasonable rental value of the premises during the time of such occupancy and withholding, but for a period of time not exceeding three years first before the bringing of this action, and from the beginning of this action to the present time. In estimating the reasonable rental value of premises you are at liberty, and it is your duty, to consider all the facts and circumstances connected with the situation and use or suitable use of the property in question, and if you believe from the evidence that the lands in question in this action have, by reason of their peculiar location relative to the waters of the Humptulips river and the large slough connected therewith, a particular value in the way of constituting in connection with proper appliances a boom, or boom site, for the catching, holding, sorting and rafting of logs, the plaintiffs in this case are entitled, in estimating the rental value of the property, to have the same calculated upon such values. Lands as generally situated, by reason of their character, may have but little, if any, value, but similar lands particularly located, may have a great commercial value and the owner of such lands, when so particularly situated, is entitled to have the commercial value of the lands taken into consideration in reckoning the reasonable rental value of the premises.

"I instruct you further that, as a matter of law, it is immaterial to plaintiffs in this action as to whether or not the defendant in this action was able to or did appro-

priate the lands in question, if it did appropriate them, with benefit to itself. It may have lost money in its endeavor to use the lands of plaintiffs, but that would make no difference in your estimating the reasonable rental value of the property. It is not what the defendant has made out of the property, but the question is as to what is a reasonable rental value, in the market, for the lands in question for the time the defendant has occupied them, if it has occupied them."

Taking the whole context of these instructions, it seems clear that the court intended that the jury should consider only the rental value for the time the defendant occupied the lands, and that it did not intend that the jury should consider rental value in the future; that is, after the time of the trial. When the court used the language complained of, it was evidently speaking of the beginning of defendant's occupancy, and referred particularly to the business or uses for which the lands were then suitable. This being the effect of the whole instruction, we think the criticism of the defendant is not justified.

It is alleged as error that the court defined a nuisance, and told the jury, in substance, that a private person may abate a nuisance when it is specially injurious to him. It is not contended, as we understand the argument, that the law, as given by the court, was not correct; but it is argued that there was no question of nuisance in the case, as tried to the jury. The pleadings made an issue of fact upon this point; but the jury failed to find, by their verdict, that the defendant was maintaining a nuisance, and the court subsequently, upon a consideration of the whole evidence upon this point, properly dismissed the complaint. It follows, therefore, that the defendant was not injured, and cannot now complain of these instructions.

It is also contended that the court erred in giving the following instruction:

"You are further instructed that the right of floatage of logs or other timber down a navigable or floatable stream refers only to the right of floatage, and does not carry with it the right to use the banks of such navigable stream or streams above the line of mean high tide,"

for the reason that it is necessary to use the banks of a stream in order to use the stream itself. This instruction clearly referred to the use of the land or banks above the line of mean high tide by passing over or upon or occupying them, and not to the use of the water within such banks. The jury were plainly told by other instructions that,

"The fact that the waters in such river or slough at times rise above the line of mean high tide and in consequence the logs in such river or slough were raised to an elevation above the line of mean high tide and the waters and logs for such time held within the banks above the line of mean high tide, would not be such a use of the banks of the stream as would entitle the adjoining land owner to collect rents or damages from the boom company."

The defendant, no doubt, has a right to use the channel of a navigable highway at all stages of the water, and such use, when the water is above the line of mean high tide, would not be a use of plaintiffs' adjoining land; but any person using such highway is confined to the limits of the highway; he may not go outside thereof for his convenience or necessity without liability. *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813.

The other instructions excepted to go to the question of damages by reason of obstructing the river and slough. The jury returned no verdict against the defendant on account of such damages. In fact, the findings upon

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this question were in favor of the defendant; hence, if erroneous, did not constitute reversible error of which defendant may complain.

The lands held by plaintiffs were purchased from the state of Washington on time contracts. During the course of the trial the court permitted the plaintiffs to introduce in evidence a certificate of the state land commissioner to the effect that the plaintiffs had kept up their payments as required, and that the contracts were in full force. The plaintiff J. P. O. Lownsdale had already testified that he had made all the payments required by the contract and that it was then in full force. He was competent to so testify. The certificate of the land commissioner was not competent, but the ruling of the court permitting it was harmless. The fact that the contract was in full force was not denied by any evidence on the part of the defendant, and became an established fact in the case without the certificate of the land commissioner.

The defendant also contends that the verdict was excessive. This was a question for the jury. It was shown, without dispute, that defendant had used a cabin and barn on plaintiffs' lands for about three years; that one end of the boom was for a time anchored to plaintiffs' land; that logs had been permitted at times to lodge upon said lands; and that the shore line, belonging to plaintiffs above the line of mean high tide, was used at times as one side of defendant's boom. Witnesses stated that the rental value of the use of this land for such purposes was from \$800 to \$1,500 per year. The jury found that the rental value to the time of the trial, being about three years, was \$3,000. There is evidence in the record to justify this finding, and, for that reason, we are not disposed to disturb it, even though we think that the extreme limit of rental value was found by the jury.

Plaintiffs, upon their appeal, insist that the lower court should have declared defendant's boom, and the use to which it was putting said river and slough, a nuisance, and, also, should have entered an order enjoining the defendant from trespassing upon plaintiffs' lands. There is no evidence in the record to justify a finding that defendant was maintaining a nuisance, either in the river or in the slough. In fact, at the time of the trial, it did not appear that either the river or the slough contained any logs. It further appeared that the use to which defendant was putting both the river and the slough was a lawful use, under the statute. The evidence also fails to show any substantial damage being done to plaintiffs' lands. An injunction was not necessary. The evidence also shows that, while defendant has used the plaintiffs' lands above the line of mean high tide, it has not, at any time, and does not now, refuse possession thereof to plaintiffs.

We find no reversible error in the case. It is therefore affirmed, neither party to recover costs on this appeal.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS. JJ., concur.

[No. 5131. Decided December 15, 1904.]

LILLY BIGGART *et al.*, Appellants, v. JOHN W. EVANS
et al., Respondents.¹

ADVERSE POSSESSION—SEVEN YEARS PAYMENT OF TAXES—GOOD FAITH OF PURCHASER—COMMUNITY PROPERTY—APPEAL—REVIEW OF FINDINGS. Where the surviving husband conveyed certain lands by warranty deed to the defendants, and the children seek to recover a one-half interest in an action in which the defendants claim title by adverse possession for seven years under claim and color of title made in good faith, and the payment of taxes under

¹Reported in 78 Pac. 925.

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Opinion Per DUNBAR, J.

Bal. Code, § 5503, findings to the effect that the property was purchased in good faith will not be disturbed, where one of the questions in issue was whether the same was community or separate property of the husband, and the testimony sustains the findings.

Appeal from a judgment of the superior court for Spokane county, Hon. A. J. Killam, Judge *pro tempore*, entered December 8, 1903, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for the recovery of real estate and damages. Affirmed.

Sullivan, Nuzum & Nuzum, for appellants.

Crow & Williams and *Denton M. Crow*, for respondents.

DUNBAR, J.—This action was commenced by the plaintiffs in the superior court of Spokane county, for the possession of an undivided one-half interest in a certain 160 acre tract of land described in the complaint. The essential allegations of the complaint are that the plaintiffs are the only children of Mary E. Turner and Charles D. Turner, husband and wife; that on the 24th day of January, 1889, said Mary E. Turner, wife of the said Charles E. Turner and mother of the plaintiffs, died intestate, leaving surviving her the above named plaintiffs, her sole heirs at law; that, at the time of her death, Mary E. Turner and Charles D. Turner were seized in fee of the lands above described; that plaintiffs, as sole heirs at law of Mary E. Turner, are the owners of an undivided one-half interest in, and entitled to the possession of, an undivided one-half interest in and to the said above described real estate; that on the 17th day of April, 1893, Charles D. Turner, without the knowledge or consent of these plaintiffs, sold and conveyed by warranty deed, all of said premises to the said defend-

ants; that, ever since the date of said sale, defendants have been in the possession of the said real estate under the said deed from Charles D. Turner, claiming to be sole owners of said real estate, and have refused to allow the plaintiffs, or either of them, to have possession of said property, or any part thereof; that the reasonable rental value of their interest in the land is \$150 per year; and judgment is prayed for the recovery of the possession of an undivided one-half interest, and for the sum of \$900 damages to the rental value.

The answer admits the relationship of the parties, but denies that the said real estate was, at the time of the transfer from Turner to the defendants, or at any time, the community property of Mary E. Turner and Charles D. Turner, but alleges that the same was the separate property of Charles D. Turner; alleges that, on the 17th day of April, 1893, for a good and valuable consideration to him paid by the defendants, the said Charles D. Turner, being then an unmarried man, by his warranty deed of that date, duly executed and delivered, conveyed to defendants the land above described; that, at the time said Turner so sold said real estate to the defendants, defendants paid him the full, fair, and adequate value of the entire interest and estate in said real estate, and understood that they were purchasing from the said Charles D. Turner the full and complete fee simple title in and to the said real estate, and that no person other than the said Charles D. Turner had any interest therein; that, since the said 17th day of April, 1893, the defendants have been in the actual, open, notorious, and exclusive possession of all of said tract of land, under claim and color of title, made in good faith; that during all of said time said defendants have paid all of the taxes legally assessed against said real estate, and that no taxes

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have ever been paid upon said real estate by any other person whomsoever, and that there are no taxes now delinquent thereunder and unpaid thereon; alleges that improvements to a considerable sum have been made upon said land by the defendants since the purchase of the same; that all of the plaintiffs had actual knowledge and notice of the purchase of said land by the defendants, and that they had never at any time interfered, or sought to interfere, with the claim of title or possession of the defendants, until the commencement of this action. The answer prays that the complaint of the plaintiffs be dismissed, and that the defendants may be adjudged to be the owners in fee simple of the real estate described in the complaint, free and clear of any right, claim, interest, or equity of said plaintiffs, or any of them, and that the title in the defendants to the said real estate may be quieted, as against the pretended claims of the plaintiffs, and each and all of them; prays for costs and disbursements. The cause was tried by the court, and a judgment rendered in accordance with the prayer of the answer.

Section 5503, Bal. Code, provides that every person in actual, open, and notorious possession of lands or tenements, under claim and color of title, made in good faith, and who shall, for seven succeeding years, continue in possession and shall, also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title; that all persons holding under such possession, by purchase, devise, or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes

for the term aforesaid, shall be entitled to the benefit of this section. And section 5505 provides that, where the holder of the adverse title is an infant or person under legal age, such person shall commence an action to recover such lands or tenements within three years after the disabilities enumerated in the statute shall cease to exist.

It is conceded by the appellant in this case that, if the defendants bring themselves within the provisions of § 5503, the judgment in this case should be sustained, for it is shown that the plaintiffs had not commenced the action within three years after the youngest plaintiff had arrived at the age of majority. But it is insisted by the appellant that the distinguishing feature between this statute of limitation and the limitation prescribed in § 4797 is that, under the provisions of § 5503, the party must hold possession of the real estate under color of title, and in good faith; whereas, under the provisions of § 4797, neither one of these elements is requisite, and that the testimony in this case shows that the title was not acquired in good faith, because it must have been known to the purchasers that the property sold was community property, and that the husband had no right to sell more than his one-half interest in said property.

The question of whether the property was community or separate property was one of the controverted questions in the case. The tenth finding of fact by the court is as follows:

"That said deed from said Charles D. Turner to said John W. Evans was made in good faith; that the said John W. Evans and said Mary L. Evans, his wife, acquired said deed in good faith, believing they were acquiring the entire fee simple interest in and to said real estate, and that they have, in good faith, paid all taxes

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legally assessed against said real estate for more than seven successive years prior to the commencement of this action, and have, in good faith, so remained in actual, open, notorious, and exclusive possession of said real estate for more than seven successive years prior to the commencement of this action, under and pursuant to said deed."

We have read all the testimony in the case and, without specially reviewing it, it is sufficient to say that in our opinion it sustains the finding of the court. The judgment will therefore be affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

[No. 5254. Decided December 16, 1904.]

In the Matter of the Estate of JOHN SULLIVAN, Deceased.
EDWARD CORCORAN *et al.*, Applicants, v. W. R. BELL,
Judge, *et al.*, Respondents.¹

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EXECUTORS AND ADMINISTRATORS—ORDERS DIRECTING THE PAYMENT OF ADMINISTRATOR'S AND ATTORNEY'S FEE—VALIDITY—NOTICE TO DISTRIBUTEES. Orders made in the matter of an estate directing the payment of sums allowed to the administrator and his attorney for fees and services, are void when made without notice or any opportunity to the distributees to be heard, and the administrator will be required to return to the estate any moneys paid out under such *ex parte* orders.

SAME—ATTORNEY FOR ADMINISTRATOR—RELATION TO THE ESTATE. An attorney employed by an administrator sustains no relation to the estate, and allowances for attorney's fees are not made to the attorney, but to the administrator, as necessary expenditures; hence, where the administrator paid money to an attorney under a void order of the court, the administrator and not the attorney will be required to return it, the adjustment of the attorney's fee being a matter of agreement with the administrator.

¹Reported in 78 Pac. 945.

CERTIORARI—REVIEW OF ORDERS DIRECTING PAYMENT OF ALLOWANCES TO ADMINISTRATOR—APPEALABLE ORDERS—ADEQUACY OF REMEDY BY APPEAL. Certiorari will lie to review *ex parte* orders made in the matter of an estate directing the payment of specified sums to the administrator and his attorney, and future allowances, where the amount of the supersedeas bond on appeal is indefinite, and the lower court has refused to fix any amount therefor, and the fruits of the appeal would be unprotected during the resort to the appellate court for a supersedeas, since the remedy by appeal is neither speedy nor adequate, especially where the sums were paid out of rentals of the real estate, which under the statute descends directly to the heirs.

EXECUTORS AND ADMINISTRATORS—DISPUTING CLAIM OF HEIRSHIP—CERTIORARI—PARTIES IN INTEREST—DESCENT AND DISTRIBUTION. Resistance to the claim of heirship does not affect the right of the alleged heirs to notice and a hearing, where the administrator seeks to pay out funds derived from the real estate, which, under Laws 1895, p. 197, vests in the heirs immediately upon the death of the ancestor; hence, upon prosecuting a writ of review from orders directing such payments, applicants proceeding in an orderly way to establish their title need not show that their claim of heirship has been established.

CERTIORARI—DECISION—PROHIBITION. Upon reversing an order of the superior court, which directed the disbursement of the funds of the estate, for the reason that the same was without notice to the heirs and void, a writ of prohibition will not be issued to enjoin the lower court from making further orders without due notice.

Certiorari to review *ex parte* orders of the superior court for King county, Bell, J., entered July 1, 1904, directing the payment of certain allowances to an administrator for services and attorneys' fees. Reversed.

Piles, Donworth & Howe and *C. H. Farrell*, for applicants.

James J. McCafferty and *J. W. Robinson*, for respondents. The writ should not issue because the applicants have a plain, speedy, and adequate remedy by appeal. *Gregory v. Dixon*, 7 Wash. 27, 34 Pac. 212; *State ex rel. Reser v. Superior Court*, 13 Wash. 25, 42 Pac. 630; *State ex*

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rel. Grady v. Lockhart, 18 Wash. 531, 52 Pac. 315; *State ex rel. Townsend Gas etc. Co. v. Superior Court*, 20 Wash. 502, 65 Pac. 933; *Browne v. Gear*, 21 Wash. 147, 57 Pac. 359; *State ex rel. Lewis v. Hogg*, 22 Wash. 646, 62 Pac. 143; *State ex rel. Cann v. Moore*, 23 Wash. 276, 62 Pac. 769; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *State ex rel. Foster v. Superior Court*, 30 Wash. 156, 70 Pac. 230, 73 Pac. 690.

HADLEY, J.—This is an application for a writ of review, directed to the superior court of King county, and to the Honorable W. R. Bell, one of the judges thereof. It is asked that certain orders directing payment of money from the estate of John Sullivan, deceased, shall be reviewed and quashed. The application further asks that the administrator of said estate and his attorney shall be required forthwith respectively to pay back to said estate the sums of money paid to them under the terms of the orders sought to be reviewed. The affidavit filed in support of the application avers that Edward Corcoran, Samuel H. Piles, and Charles H. Farrell as administrator of the estate of Hannah O'Callaghan, deceased, are the parties beneficially interested in the application, for the following reasons, to wit: That said John Sullivan died in the city of Seattle, on the 26th day of September, 1900; that said Hannah O'Callaghan is one of the heirs and next of kin of said Sullivan, and that she died in the city of Cork, Ireland, on or about the 21st day of May, 1904; that said Charles H. Farrell is her duly appointed and qualified administrator; that at the time of her death said Hannah O'Callaghan was the owner of an undivided one-fourth of the estate of said Sullivan; that said Edward Corcoran is also one of the heirs and next of kin of said Sullivan; that said Samuel H. Piles is a grantee

of said O'Callaghan and Corcoran of an undivided half interest in the said Sullivan estate. It is further averred that, on the 1st day of July, 1904, the Hon. W. R. Bell, as judge aforesaid, without notice to any one and without having acquired any jurisdiction in the premises, made an order directing Terence O'Brien, as administrator of said Sullivan estate, to appropriate out of any moneys or effects of the estate in his hands, as compensation in full for his services as administrator from the 20th day of December, 1902, to the 20th day of June, 1904, the sum of \$6,300, and that said administrator also pay to himself thereafter the sum of \$350 per month out of any moneys in his hands belonging to said estate, until the further order of the court. It is alleged that, up to and including January 2, 1903, said administrator had been allowed and paid, on account of his commissions as administrator, sums aggregating \$20,074.16, and that the above mentioned order, directing him to pay himself \$6,300, and also \$350 per month thereafter, is for amounts in addition to said \$20,074.16; that said estate was appraised at \$447,000, and that, outside of a mortgage debt of \$60,000, the indebtedness of Sullivan at the time of his death did not exceed \$1,000. It is further alleged that, at the same time said court made the above mentioned order for the administrator to pay himself said \$6,300, it also ordered the administrator to pay to James J. McCafferty, as his attorney, the sum of \$1,700 out of funds of the estate in the hands of the administrator; that by said order the court also fixed the compensation of said McCafferty from the 16th day of February, 1903, to the 16th day of February, 1904, at the sum of \$2,400, and credited upon said amount the sum of \$1,500 theretofore ordered paid, and which was then and is now involved in an appeal pending in this court; that after

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crediting said \$1,500, there remained \$900 of the amount allowed as above for said one year period; that said order also fixed the compensation of said McCafferty from February 16, 1904, to June 16, of the same year, at \$800, and directed it to be paid, together with said \$900, making \$1,700 as aforesaid; that in said order the court also directed the administrator to pay any necessary expenses, connected with the appeal, from the \$1,500 order above mentioned; that the order was made without notice to any one, and these applicants had no knowledge thereof until the 13th day of July, 1904. It is alleged that the order for the payment of \$1,500, as attorney's fees, hereinbefore mentioned as on appeal to this court, was also made without notice, and that, if these repeated allowances without notice to any one continue to be made, the estate will be finally plunged into debt, so that it will be unable, from its income, to meet the expenses of interest on said \$60,000 mortgage, and of taxes and ordinary repairs. It is also made to appear by the affidavit that, prior to the allowance of attorney's fees to said McCafferty, the firm of Pratt & Riddle was paid the sum of \$10,000 from said estate, on account of fees as attorneys for said administrator. It is further shown that the final settlement of the estate is postponed, on account of pending litigation between the persons claiming the estate as heirs and next of kin of said Sullivan on one side, and one Marie Carrau on the other, the latter claiming the entire estate under an alleged nuncupative will.

Upon presentation of the affidavit reciting the above facts, together with others which we think it is unnecessary to repeat now, an order was by this court directed to respondents, requiring them to show cause upon July 29, 1904, why a writ of review should not be granted

for the purpose of effecting a review of the orders above mentioned. At the hearing the respondents argued a motion to discharge the order to show cause and a demurrer to the application as being insufficient. It is the position of the applicants that the orders are void, as having been made without jurisdiction, for the reason that they were made entirely *ex parte* and without notice of any kind to persons interested as distributees of the estate. The principle involved seems to be so fundamental that citation of authorities is unnecessary. Indeed, the principle is not controverted by the respondents, but they assert that the orders are merely interlocutory, and are neither conclusive nor binding against the right of the distributees to be heard upon final settlement of the estate. The orders are, however, entered in the form of solemn judgments of the court. They show that testimony was heard; that the court made findings that the amounts were reasonable, and unqualifiedly commanded their payment. They bear no evidence that they were entered as mere interlocutory orders, subject to future review by the court upon a full hearing when all parties should be before it.

"Interlocutory (in law) means that which does not decide the cause, but settles some intervening matter relating to the cause." 16 Am. & Eng. Law (2d ed.), 1117.

These orders purport to be decisive of the matters involved, and leave nothing to be done hereafter in relation to the subject matter. The argument of respondents being to the effect that the orders are of no binding force, for the reason that they may be reviewed at the hearing upon final settlement of the estate, then why should they be entered as the deliberate judgments of the court based upon testimony and findings as to facts?

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In form they at least have the appearance of having been intended to be final and conclusive as to all concerned.

Respondents say that our statutes provide for no notice whereby persons interested in an estate may be brought into court for the hearing of matters of this kind, except the notice of final settlement. If that be true, then it is manifest the court cannot acquire jurisdiction to determine them until after such notice has been given, unless all interested parties appear in response to some other kind of notice, and voluntarily submit to the jurisdiction of the court. The effectiveness of any other kind of notice, served during the course of administration, is not now before us for determination. But, in the absence of any notice or of voluntary appearance, the orders in question must, under respondents' own theory, be without force and therefore void. If an administrator shall pay money to himself for his own services pending the course of administration, without due hearing upon notice, he must do so at his peril, for the court can enter no orders or judgment that will protect him until the interested parties are before it, or until they have been properly notified. If the court assumes to act in an *ex parte* manner, it can amount to no more than a mere advisory act, and the administrator who pays money to himself in pursuance thereof must do so knowing that the matter cannot be finally and judicially determined until all interested persons are before the court, or until they have been duly notified. The same principle applies to payments made to the administrator's attorney. The allowance for attorney's fees is not made to the attorney, but to the administrator, as a necessary expenditure incidental to his settlement of the estate. There is no relation between the administrator's attorney and the estate, and he can assert no

claim against the estate for his services, but the administrator is himself liable in a suit by the attorney. Woerner on Amer. Law of Admr. (2d ed.), § 356; *Austin v. Munro*, 47 N. Y. 360; *Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530; *Thomas v. Moore*, 52 Ohio St. 200, 39 N. E. 803; *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230; *Barker v. Kunkel*, 10 Ill. App. 407. It follows that money paid by an administrator to his attorney from funds of the estate must also be paid at the peril of the administrator, until the court has duly adjudicated the administrator's claim for its allowance after all interested parties have had an opportunity to be heard.

Respondents contend that the orders in question cannot be reviewed under the writ of review, for the reason that the applicants have a remedy by appeal. The applicants admit that they have the remedy of appeal, but they urge that it is inadequate to preserve the fruits of the appeal. It will be remembered that one of the orders, in addition to directing the administrator to pay himself, outright, the sum of \$6,300, also authorizes him to pay to himself the sum of \$350 each month thereafter. It is therefore manifest that, pending an appeal, other sums aggregating a large amount would be paid out. It would be impracticable to estimate and fix, as upon a judgment for the recovery of money, the necessary amount for a supersedeas bond to cover the monthly sums for the uncertain time to elapse pending an appeal. The other order involved in this application, in addition to providing for the payment of \$1,700 outright as attorney's fees, also directs the payment of the expenses of an appeal from a similar order for \$1,500 theretofore ordered, and which has been hereinbefore mentioned. The appellants in that appeal, being the applicants here,

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are prosecuting it for the purpose of saving that money to the estate, and it is difficult to understand upon what theory the administrator is interested in paying out funds of the estate to defeat that appeal. In any event, however, the order directs the payment of an indefinite amount for that purpose. The same difficulty therefore exists as to a supersedeas bond in the event of an appeal as in the case of the other order. Moreover, it is made to appear in the application that the same court has heretofore refused to fix an amount for a supersedeas bond in the appeal from the said \$1,500 order; and also declined to recognize as a supersedeas a bond in ample amount which was filed. The orders here involve the same principle as the other, and, since it is the theory of the court that such orders may not be superseded, it appears that an appeal will not be adequate to preserve the fruits thereof. In any event, it would seem that, to effect a stay of proceedings, resort to the appellate court would first be necessary, in order to determine if a supersedeas bond should be recognized by the lower court, and meantime the fruits of the appeal would be unprotected. Therefore, under all the circumstances, we believe the applicants are entitled to adopt the more direct method, and have the matter examined under the writ of review, as the only speedy and adequate remedy. In *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385, this court said:

"This court has held in a long line of recent cases that the extraordinary writs of certiorari, prohibition, and mandamus will not issue to correct the action of the superior court when the court is acting erroneously, either with or without jurisdiction, but always with the provision that there is an adequate remedy by appeal. This adequate remedy has not been construed to be as speedy a remedy as the remedy by extraordinary writ

might be, but a remedy which preserves the fruits of the appeal when won. In other words, the *status quo* of the parties litigant must be preserved, and, if by awaiting the result of an appeal the fruits of the litigation would be lost, the remedy has not been considered an adequate remedy."

It is true the court in that case was dealing with the question of the right of a street railway company to erect a trestle in a street, which might have the effect to damage the property of an abutting owner, and it was held that he was entitled to have the damage ascertained before the structure was built, in order that his property might not be taken or damaged without due process of law. A bond for the protection of the property owner had been recognized by the lower court, but this court said:

"The protection to the owner of the property is not the protection guaranteed by a bond upon which suit would have to be instituted, and the party subjected to all the delays and dangers incident to a law suit, with the possibility of bondsmen becoming insolvent, nor any other compensation that is coupled with doubtful results, vexations, or delays."

The principle there discussed is analogous to the one involved here. The funds of this estate are the property of the distributees, consisting as they do of the rentals of real estate, and they are entitled to be protected therein as they would be in the real estate itself. In *In re Kruger's Estate*, 123 Cal. 391, 55 Pac. 1056, the supreme court of California said:

"An order for the payment of money, by which the property of the heirs, legatees and devisees is to be taken from them, cannot be made without notice and an opportunity to them to be heard. It cannot require the citation of authority in support of the proposition that one

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may not be thus deprived of his property without process of law."

It is also contended that the applicants have no standing here, for the reason that it has not been established that they are heirs of the estate. The application, however, states that they are such, and, also, that litigation is pending between them and one Marie Carrau, who claims the entire estate as aforesaid. It therefore appears that the applicants not only claim to be the heirs, but that they are proceeding in an orderly manner to establish their title to the funds of the estate. As orderly claimants of the estate, it cannot be the law that, pending the resistance to their claim, they have no right to be heard as to the disposition that shall be made of the funds by the custodian thereof. In that event, it would be possible for the entire estate to be dissipated before their rights could be finally adjudicated. Under the statute of 1895, session laws of that year, page 197, the title to lands, or any interest therein, vests immediately in the heirs. See, also, *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765; *Anrud v. Scandinavian-American Bank*, 27 Wash. 16, 67 Pac. 364. Since the title vests in the heir at the time of the decedent's death, he is entitled thenceforth to be heard as to the disposition of the estate, and the mere fact that a resistance to his claim of heirship may exist does not deprive him of such right. The administrator who seeks to pay out the funds of the estate, for his own and counsel's services, must recognize the right to be heard on the part of all claimants, as heirs or devisees, who proceeded in a regular way until conflicting claims have been finally adjudicated. It follows from the foregoing that the respondents' demurrer to the application for a writ of review, and their motion to be discharged thereon, must be overruled.

The answers and affidavits of the respondents, we think, present no sufficient additional reasons why the orders discussed shall not now be reviewed. Therefore, inasmuch as the orders are void, they should be quashed, and it is now ordered that they be quashed of record. It follows from what has been said that the administrator must return to the funds of the estate any moneys he may have paid out under claim of authority from said orders. This not only includes money paid to himself, but also any paid to his attorney. The applicants ask that Mr. McCafferty, as the administrator's counsel, be by this court directed to return to the estate any money received by him from the administrator, under claim of authority from said orders; but, as we have hereinbefore seen, the attorney sustains no relation to the estate, and is not a party thereto. The administrator is the party before the court who must account for the funds of the estate. The adjustment of the amount of attorney's fees that shall be paid is a matter of agreement between him and his attorney. But, if paid from funds of the estate, he must know that he cannot be protected in its disbursement until the court has ordered it paid, after a hearing with interested parties before the court, either by notice or otherwise. We therefore decline to make any order directed to Mr. McCafferty, but leave him and the administrator to adjust their own affairs. It is, however, now ordered that Mr. O'Brien, the administrator, shall return to the funds of the estate all moneys paid out by him under said so-called orders.

The applicants also ask that a writ of prohibition shall issue enjoining the lower court from making further orders for the disbursement of the funds of said estate without due notice. We shall not assume that a superior judge will make such orders without notice or without the

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parties being voluntarily before him, in the face of what has been said in this opinion. The application for prohibition is therefore denied, but the review is granted, and the matters reviewed as hereinbefore stated. The lower court is directed to proceed in accordance with this opinion.

FULLERTON, C. J., and MOUNT, DUNBAR, and ANDERS, JJ., concur.

[No. 5171. Decided December 17, 1904.]

H. S. WILLARD, *Respondent*, v. DANIEL FISHER *et al.*,
Appellants.¹

APPEAL—PARTIES—SERVICE OF NOTICE—APPEAL BY INTERVENORS—CORPORATION NECESSARY PARTY TO APPEAL. Where, in an action brought against a corporation by a stockholder, temporary injunctions are issued, after an appearance and contest by the corporation, restraining the corporation and its officers and stockholders from holding a stockholders' meeting, during the pendency of the action, and subsequently certain stockholders intervene in their own right, and appeal from an order refusing to dissolve the temporary injunctions, the corporation is a necessary party to the appeal, and interested therein, upon whom service of notice of the appeal by the intervenors must be made, or the appeal will be dismissed.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered January 4, 1904, denying the intervenors' motion to dissolve temporary injunctions entered December 7th and 8th, 1903, after a hearing on the merits. Appeal dismissed.

A. H. Kenyon and *W. C. Jones*, for appellants.

H. S. Stoolfire and *John C. Kleber*, for respondent.

¹Reported in 78 Pac. 917.

HADLEY, J.—The respondent brought this suit against the Lucile Dreyfus Mining Company, a corporation. The complaint, in effect, alleges that on or about December 2, 1902, the respondent was the owner and holder of 127,000 shares of valid stock of said company; that on said date he surrendered and delivered the certificate therefor to the company, for transfer of the stock to his name and account, on the books of the corporation; that, with full knowledge of the surrender of said certificate for said purpose, the secretary then issued to him, in lieu of the former one, a certificate for 127,000 shares; that the corporation denies the validity of the stock thus issued, refuses to recognize and classify it as valid, and to make an entry of it upon the books of the company, although the same has been demanded by respondent; that the by-laws provide that each stockholder shall have two weeks written notice, by mail, of the meetings of stockholders; that, without giving respondent said notice, or any notice whatever, the secretary of the company has notified some of the stockholders of a meeting to be held December 7, 1903, for the election of trustees; that the corporation threatens to exclude, and unless restrained will exclude, respondent from exercising any of the rights of a stockholder, and will deny him the right to vote his stock at any and all stockholders' meetings, and to participate in the election of trustees; that, after December 1, 1902, the secretary of the corporation, while acting as such, issued and circulated certificates purporting to represent stock of the company in excess of its capital stock, to the extent of more than 1,000,000 shares, which certificates are held by divers persons who, at said meeting, threaten to vote, and unless restrained will vote, the same as valid stock, and thereby control the management of the company;

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that all stock accounts of the corporation are confused by raised, forged, and spurious issues, and the genuine stock of the company cannot be determined by its records; that it is beyond the power of the corporation, its officers, or stockholders, to determine the various controversies concerning its stock, and for which it has now an action pending. It is alleged, that respondent is without a plain, speedy, and adequate remedy at law, and that, unless restrained as prayed, the control of the company will pass into the hands of the holders of spurious stock. The complaint prays for a decree requiring the corporation to enter upon its books and classify said 127,000 shares as valid stock of the company; that respondent's title therein shall be quieted, and he declared to be entitled to the right of a stockholder.

In response to notice of intention to apply for a restraining order pending the suit, the corporation appeared on December 7, 1903, and resisted said application. A restraining order was, however, issued, by the terms of which the corporation, its trustees, officers, agents, employees, and all persons under its control, were enjoined from holding a meeting of stockholders for the election of trustees on December 7, 1903, or any adjourned meeting, until the further order of the court.

On the following day, December 8, 1903, respondent filed in the action a supplemental complaint, in which he alleged that, pursuant to the notice of the stockholders' meeting mentioned in the original complaint, as given to a part of the stockholders only, the same to be held December 7, 1903, various alleged and pretended stockholders of the corporation met at the office of the company, at the hour of four o'clock, P. M., on said day, and assumed to convene a stockholders' meeting; that at said meeting these persons assumed to take control of the

property, effects, and accounts of the company; that they attempted to consider and pass upon the validity of their own stock, and that of their associates, and upon their rights as stockholders, all for the unlawful purpose of obtaining control of the corporation; that they assume and threaten to evade the provisions of the restraining order, issued as hereinbefore stated on the previous day, by the indirect means of assuming control of the company and its officers, changing its by-laws, and threatening to transact all business of the company, which can be done by its trustees only, or by a lawful and regular meeting of the stockholders; that said meeting was adjourned until two o'clock P. M., December 8, 1903, at which time the aforesaid acts will be done as stated; that the holders of valid stock are unknown to the company; that the records of the company do not disclose who are entitled to the standing of holders of valid stock, and entitled to the right to vote as such; that the corporation has an action pending to procure a decree quieting the title to the valid stock, to determine who are its holders entitled to vote thereunder, and who are not entitled to vote by reason of any over-issue held by various persons; that the said action is undetermined, and the corporation will be wholly unable to determine who are properly entitled to vote the stock until it is finally determined in said action who are its holders; that to permit the various persons who are convened, and who will convene again at the said adjourned meeting, to hold a pretended stockholders' meeting and exercise the right of stockholders, as contemplated, will place in jeopardy all the property rights and interests of the corporation; that respondent, being a large holder of valid stock of the company, is entitled to have its rights and property protected from unlawful usurpation of power by persons not en-

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titled to the rights of stockholders; that he has requested various officers and trustees of the corporation to take immediate action to enjoin the further and continuous action of said persons at said meeting, or any adjourned meeting thereof, but they have refused. This supplemental complaint prays for an additional restraining order, enjoining the holding of any and all meetings of stockholders, for election of officers or trustees, until this action, and the one instituted by the corporation to determine the validity of the stock, have been adjudicated.

In response to notice of intention to apply for an additional restraining order, under the supplemental complaint, the corporation again appeared and resisted the application. A restraining order was, however, issued enjoining the corporation, its trustees, officers, stockholders and all persons under its control, from holding stockholders' meetings for the election of trustees or any other purpose, and particularly from holding any meeting under the notice aforesaid, or any adjourned meeting thereof. The same persons were also restrained from in any way changing the records of the stock or other accounts, from changing the by-laws or management of the company, from assuming to pass upon the validity of the stock or voting the same, until the legally authorized stock, and the persons entitled to it, have been fully determined by a court of competent jurisdiction, or until the further order of the court.

Thereafter the appellants here, having obtained leave, filed their complaint of intervention in the cause, and moved the court to dissolve the restraining order above mentioned. The motion to dissolve was denied, and from said order of denial the intervenors have appealed.

Respondent moves to dismiss the appeal upon the ground that no notice of appeal was served upon the

Lucile Dreyfus Mining Company, defendant in the case. It will be remembered that the action was brought by respondent against said corporation only, the appellants coming into the action by said intervention. After the corporation had appeared at each application for a restraining order, and after both orders had been issued, the appellants were permitted to intervene. Under the former decisions of this court, the motion to dismiss the appeal should be granted upon the ground stated, unless, for reasons urged by appellants, the case does not come within the rule.

The intervenors' complaint alleges that they are stockholders in the defendant corporation, and that they represent, in their own right and by proxy, a majority of the genuine stock of the corporation. Many allegations of the original and supplemental complaints are denied but it is admitted that a large amount of spurious stock has been circulated. It is alleged, however, that it was done by the secretary's forgery, as his own felonious act, and that he neither acted for the defendant corporation, nor with the knowledge or consent of its officers. They deny the validity of respondent's stock, and, on the claim that their own is valid, they seek to be released from the effects of the restraining order so that they may go on and hold stockholders' meetings. Pending the hearing of the issues thus joined, they moved for the dissolution of the restraining orders, and, having appealed from the denial thereof, they now urge that the defendant corporation is not such a party here as requires the service of notice of the appeal upon it. They say that they are not attempting to appear for the corporation, but are seeking to vindicate a personal legal right which pertains to them simply as stockholders, a right in which

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they claim the corporation itself has no concern or interest.

They came into this action, however, and asked to be allowed to become parties when the corporation was the sole defendant. It had appeared to resist each restraining order, and each one was directed against the corporation. They are, therefore, parties, and, with the corporation, seeking to have undone what it endeavored in advance to prevent. Their complaint in intervention names the corporation as a party thereto, and denies allegations of the original complaint, which have not been denied by the corporation. Why has not the corporation an interest or concern as to who shall hold stockholders' meetings, assuming to decide who shall control its assets, affairs, and policy? The corporation represents all the valid stockholders, and they are vitally interested. Appellants assert that their stock is admittedly genuine, but we find in the statement of facts an affidavit to the effect that it is impossible for the corporation to determine from its records who are genuine stockholders, until the suit it has brought to test that matter shall be determined, and that "the stock of each and all of the intervenors, and the proxies shown by them, is involved in the said action, and the question as to whether or not it is valid stock of the defendant company has not yet been determined." This is not a direct denial of validity, but it is as nearly such as the uncertain circumstances shown by the record seem in conscience to permit. It at least shows that the matter of its validity is in suspense. In fact, the allegations of the pleadings and the affidavits in this record are such as make it seem to us that nothing short of a judicial determination will establish who are stockholders of the defendant corporation, and entitled to hold its stockholders' meetings. In that

subject the corporation must be vitally interested. For aught that we know, the corporation may now desire to acquiesce in the continuance of the restraining orders until the final determination of this action, and of the other one mentioned. It has not appealed, and, not having been made a party to this appeal, it is not here to be heard. This court has repeatedly held that failure to serve notice of appeal upon all parties appearing in the action, who have not joined in the appeal, is ground for dismissal of the appeal. *Dewey v. South Side Land Co.*, 11 Wash. 210, 39 Pac. 368; *Casey v. Oakes*, 13 Wash. 38, 42 Pac. 621; *Hinchman v. Point Defiance R. Co.*, 14 Wash. 171, 44 Pac. 152.

For the reasons hereinbefore stated, we think this case should not be distinguished from the above cited ones, and the appeal is therefore dismissed.

FULLERTON, C. J. and MOUNT, ANDERS, and DUNBAR, JJ., concur.

[No. 5091. Decided December 19, 1904.]

FRANK PHINNEY, *Appellant*, v. THE STATE OF WASHINGTON, *on the Relation of W. B. Stratton, Attorney General, Respondent*.¹

GIFTS—MORTIS CAUSA—VALIDITY—CHECK ON BANK. Where the deceased in his last sickness gave to his friend a check upon his bank in another town for nearly all of his estate, with the understanding that the gift was to be revoked in case of his recovery, and directed that the same be mailed to the bank, the same constitutes a valid gift *mortis causa* although owing to a misdelivery the check did not reach the bank until after the death of the donor, especially where there is no controversy with creditors or subsequent donees or assigns.

¹Reported in 78 Pac. 927.

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SAME—CONSTRUCTIVE DELIVERY—ASSIGNMENT OF FUNDS IN BANK—INTENT. In such a case, the fact that a check on a bank does not ordinarily constitute an assignment of the fund does not prevent the same from being a constructive delivery, as the subject of the gift was not available, and great latitude ought to be given to carry out the intent of the donor, where there is no contest with creditors.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered November 16, 1904, upon findings in favor of the state, as intervenor and claimant, upon the final settlement of an estate, after overruling a demurrer to the complaint in intervention and a trial upon the merits before the court without a jury. Reversed.

Million & Houser, for appellant.

J. C. Waugh, for respondent.

DUNBAR, J.—The following is the appellant's presentation of the facts in this case, which an examination of the record has proven to be substantially correct: The decedent, John W. Collins, and appellant, Frank Phinney, had been friends for some time prior to Collins' death. Some two weeks before his death, Collins was taken sick at Anacortes, and was attended by appellant as nurse and companion. On the 12th day of February, 1902, Collins and appellant left Anacortes for Harrison Hot Springs, B. C., with the intention of benefitting Collins' health. They arrived at the Springs on the following day, where they remained until Collins' death. During all of this time appellant was acting as companion and nurse to Collins. Shortly after their arrival at the Springs, Collins was placed under the care of Dr. Elliott, who treated him up to the time of his death.

On or about the 22nd day of February decedent had a very severe hemorrhage of the stomach, from the effects

of which he seems to have gradually failed, until his death, which occurred on the 27th of February. Shortly after the hemorrhage, Collins requested appellant to go to the office and get a pen and ink, stating that he desired to write a check. About the time the appellant returned with pen and ink, Dr. Elliott had also returned to his patient, and appellant declining to write out the check and insisting that the deceased ought not to disturb himself at that time, the doctor was requested to write it, and, at Collins' dictation, a check was drawn up in favor of Frank Phinney, on the bank of LaConner, for the sum of \$4,000. The check was then handed to appellant with a statement by Collins that, "If I don't get over this I want Frank to get my money; I don't want it to go to Skagit county." The statement also shows that the gift was to be revoked in case Collins got well. Collins then directed apppellant to forward a letter to the bank at LaConner, containing the check, and, at the same time, wrote a letter to the bank himself, inclosing his pass-book, and directing the bank to balance his book and return it to him. He then directed appellant to address both letters and mail them, which was done the following morning, February 27th. The letter containing the pass-book was received by the bank of LaConner on the 25th day of February, and the pass-book was balanced on that day and returned to Collins. The letter containing the check was miscarried to LaCombe, B. C., and, by reason of that fact, did not reach the bank at LaConner until March 3rd, some five or six days after Collins' death. The bank, having been apprised of Collins' death, refused to honor the check when it arrived.

Collins died intestate, and left no wife, heirs or next of kin, and no creditors. Appellant was duly appointed administrator of the estate, notice to creditors was duly

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given, and an inventory filed as required by law, in which all the personal property of decedent was included. The \$4,000 covered by the check was not included in the inventory, or treated in any of the proceedings as an asset of the estate, but was at all times claimed by said Phinney as his own personal property by virtue of the gift from Collins. On the 10th day of July, 1903, appellant filed his final account, and asked that his acts be approved, and that he be discharged. At the time for hearing the final account and application to be discharged, the case was continued, and the state intervened, claiming the \$4,000 as an escheat to the state of Washington for the benefit of the common schools. The motion to strike said intervention, for the reason that it was irrelevant, incompetent, and immaterial, was overruled. A demurrer was interposed, that the facts stated in the petition of intervention did not constitute a cause of action, and for the further reason that the petitioner had no legal capacity to sue. The demurrer was overruled, to which ruling the appellant excepted, and his exception was allowed. Thereupon said cause proceeded to trial, and, at the conclusion thereof, the court found that, at the time of deceased's death, there was standing to his credit in the Skagit county bank of LaConner the sum of \$4,420.50, including the \$4,000 claimed by appellant, and after the payment of all just debts and expenses of administration, there remained a balance of \$3,145.32, and that said amount did not belong to appellant, but that the same belonged to, and should be turned over to, the state of Washington for the use and benefit of the common school fund; to which appellant excepted, and he now brings the case to this court and asks that the same be reversed, and remanded back to the lower court

with instructions to proceed in accordance with the law of the case.

The errors assigned are, that the court erred, in denying appellant's motion to strike the petition in intervention; in overruling the demurrer to the petition in intervention; in holding the amount of said check to belong to said estate; and in awarding the balance of \$3,145.32 to the state of Washington as escheated property. The view we take of the third assignment renders unnecessary a discussion of the first two. It was the opinion of the court, upon which its judgment was based, that the acts shown in the statement of facts did not constitute a gift *mortis causa*, and that the drawing of the check in favor of appellant did not constitute an assignment of the fund in the bank to the extent of the amount of the check. So that we will discuss the case squarely upon the equitable question of whether or not, under the circumstances surrounding the giving of this check, the appellant is entitled to the amount specified in the check.

Under the provisions of the civil law there were three distinct kinds of gifts, all brought within the general definition of *donatio mortis causa*; first, where a person, not *in periculo mortis*, but moved by the general consideration of man's mortality, makes a gift; second, where a person, being moved by fear of present peril, gives so that the subject of the gift is immediately made the property of the donee; and third, where the person, being in peril of death, gives something that shall become the property of the donee only upon the death of the giver. But all modern courts have held that the first two are mere donations, and that such gifts do not properly fall within the definition of *donatio mortis causa*, or within the rules of law governing such a gift. The gifts known to the law as *inter vivos* and *mortis causa* have many essen-

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tial elements in common, and the rules of law applicable to rights under them are frequently applied interchangeably, as will be seen by the decisions hereafter quoted. The principal difference is that a gift *inter vivos* must be without any conditions attached to it, while a gift *mortis causa* must be made upon the apprehension of death, which must occur without the revoking of the gift, and it must be made with the understanding that the gift is void in case of the giver's recovery. It is now conceded by all modern authority that every species of personal property capable of delivery, either constructive or actual, may be the subject of a gift *mortis causa*.

There is some contention in respondent's brief that the facts are not exactly as claimed by the appellant. But an examination of the record convinces us that the statement of appellant is substantially correct; that the deceased, Collins, was of sound and disposing mind; that no influence whatever was brought to bear upon him; that the appellant rather discouraged than encouraged the transaction, having regard for the physical welfare of his friend; that the check was made at the instance and request of the deceased; that it was made for the purpose of assigning his interest in the amount expressed in the check to his friend; that it was expressly so stated at the time that that was the intention in making the check; and that the gift was to be void in case of the recovery of the deceased.

Many of the old English cases hold that the giving of a check upon a bank does not constitute an assignment of the amount deposited in the bank for which the check is given, and such, no doubt, is the law in ordinary business transactions, and is the law of this state, as held by this court in *Commercial Bank v. Chilberg*, 14 Wash. 247, 44 Pac. 264, 53 Am. St. 873. A large amount of

the business of the country is done through the medium of banks, and it has not been thought best by the courts to allow the banks to be made responsible in contests between the depositor and his creditors. Therefore the acceptance of a check was held to be the test of the responsibility of the bank. But it must be borne in mind that there is no contest in this case between the donor or his estate and the donee, or the appellant in this case, and that there is no contest between the appellant and any creditors of the estate. So that, viewed from an equitable standpoint, it is the duty of the court to ascertain what was the intention of the donor in respect to this alleged assignment of interest, and, when that intention is ascertained, to give it force and effect. This distinction many of the courts have failed to notice, and the rule that a check on a bank does not constitute an assignment of the fund is frequently stated as a general proposition, when an investigation of the case shows that the principle was announced with reference to a contest which was waged between creditors of the estate, or other assignees of the estate, and the donee. The modern authorities almost universally hold that the greatest latitude ought to be given to carry out the expressed intent of the donor, and that, in cases like the one at bar, where there are no conflicting interests by creditors or other assignees or donees of the deceased, the giving of the check is an assignment of the interest.

Many of the courts, it seems to us without any sufficient reason, have undertaken to make a distinction between cases where the check given was for the whole of the fund, and where it was only for a portion of the fund. In the case at bar we think it may be justly concluded that it was the intention of the donor to give to his friend the whole of his estate. He evidently did not know

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the exact amount that he had in the bank, and, while there were a few hundred dollars over and above the \$4,000, he felt that he was going to die soon, and, according to his expressions, as shown by the testimony, it was evidently his intention that all of his fortune should go to the appellant. But, in any event, there seems to be no reason why the giving of the check for a portion of the deposit should not be an assignment *pro tanto* of the deposit. And, recurring again, a moment, to the essential qualifications of the gift, it is true that, in cases of gifts *mortis causa*, there must be a delivery of the thing given, and this is the rock upon which courts have so often split. And it is also true that it must be as nearly an actual delivery to the donee as the circumstances of the case, and the nature and actual position of the donee, and the thing given, will permit. But, in the very nature of business transactions of this kind, this delivery must frequently be constructive. The nature and circumstances surrounding this case necessitated a constructive delivery. The subject of the gift was not available. The decedent did all that was in his power to do to deliver the money in the bank at LaConner to the appellant. So that, in justice and common sense, it seems to us that the delivery was complete, and that the will of the deceased ought not to be thwarted by any technical construction or definition of delivery.

In *Guinan's Appeal*, 70 Conn. 342, 39 Atl. 482, it was held that a delivery of bank books, with intent to vest in the donee the title to the money therein represented, is a sufficient delivery to constitute a valid gift of the money. In this case the deceased, Kate Healy, took the three bank books in question from under her pillow, and gave them to her sister Winifred Miller, and also gave to her the keys to her trunks, which she took

from a small satchel. In giving these articles to Mrs. Miller, Kate Healy said: "Those bank books I give to you, and the keys to my trunks. These are yours, and everything I got belongs to you. If anything happens to me, I want you to have everything." It was found that, at the time this gift was made, the said Kate Healy was in the expectation of immediate death, and under those circumstances the rule was announced as above. It has universally been held that the delivery of a key to a trunk, the contents of which had been given to a donee, in cases of gifts *mortis causa*, is a delivery and an assignment of the contents of the trunk. It might properly be considered, as urged by the appellant in this case, that the giving of the check in this case was equivalent to the giving of a key to a trunk. It was the thing that forced an entrance to the fund which the deceased had on deposit. It was held in *Polley v. Hicks*, 58 Ohio St. 218, 50 N. E. 809, 41 L. R. A. 858, that a delivery to a donee of a deposit book issued by a savings bank, containing entries of deposits to the credit of the donee, with the intention to give the donee the deposits represented by the book, and accompanied with appropriate words of gift, is a sufficient delivery to constitute a valid gift of such deposits, without assignment or transfer in writing. And the court quoted approvingly from *Grover v. Grover*, 24 Pick. 261, where the supreme court of Massachusetts, in answering the objection that no valid gift of a chose in action could be made without assignment, said that:

"As a good and effectual equitable assignment of a chose in action may be made by parol, and as courts of law take notice of and give effect to such assignments, there seems to be no good foundation for the objection. It is true that the cases, which are numerous, in which such equitable assignments have been supported, are

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founded on assignments for a valuable consideration; but there is little, if any, distinction in this respect between contracts and gifts *inter vivos*,—the latter indeed, when made perfect by delivery of the things given, are executed contracts. 2 Kent's Com. (3d ed.) 438. By delivery and acceptance the gift passes,—the gift becomes perfect and is irrevocable. There is therefore no good reason why property thus acquired should not be protected as fully and effectually as property acquired by purchase. And so we think a gift of a chose in action, provided no claims of creditors interfere to affect its validity, ought to stand on the same footing as sales.' And this is the rule which prevails in the federal courts, and in all of the states in which the question has arisen; and it has been before the court of last resort in many of them."

citing Thornton on Gifts, § 271. Also citing *Camp's Appeal*, 36 Conn. 88, 4 Am. Rep. 39, where it was held that a delivery to a donee of a savings bank book, containing entries of deposits to the credit of the donor, with the intention to give the donee the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits; and that a delivery of a chose in action that would be sufficient to vest an equitable title in a purchaser is sufficient delivery to constitute a valid gift of such chose in action, without a transfer of the legal title. There certainly could be no more virtue in the delivery of a savings bank book to the donee than there is in the delivery of a check to the donee, and there is not as much reason for an assignment of a check as there is for an assignment of the books, because the issuing of the check, the ordering of the payment, authorizes the effect and result which is authorized by an assignment. A delivery of the key of a chest, with words of gift of the chest and its contents, is a good delivery to pass the property to the donee. *Marsh v. Fuller*, 18 N. H. 360. In *Waite v. Grubbe*, 43 Or. 406, 73 Pac. 206, where the father made

a gift of money to the daughter, which money was buried in different places upon the farm, and was not susceptible of an actual manual delivery, and where the father said, "If I should get well, and want some of it, would you let me have it?" and she replied, "Yes, papa, if you get well you can have all of it," a case which in principle resembles very much the case at bar, it was held that the gift was sufficient to convey the property, and the court quotes approvingly, *Blake v. Jones*, 1 Bailey's Eq. 141, 21 Am. Dec. 530, as follows:

"That seems to be regarded as a sufficient delivery which would authorize the donee to take possession without committing a trespass."

The court in that case continues:

"It is not necessary that there be a manual delivery, or an actual transition from hand to hand. The delivery may be constructive or symbolical, but the general rule is that it must be as perfect and complete as the nature of the property and the attendant circumstances and conditions will permit."

And if the delivery in this case could not be made under the circumstances that it was attempted to be made, it could not be made at all, and the will of the deceased would be thwarted. Also citing Thornton on Gifts, § 148, that where the intent to bestow is obvious and clear, and the language and deportment of the donor indicate a belief upon his part that he has done all that is necessary to accomplish his purpose, they come to the aid of the act of delivery, if slight and ambiguous, but not to dispense with it as an essential element of a valid gift. In *Thomas' Admr. v. Lewis*, 89 Va. 1, 15 S. E. 389, 37 Am. St. 848, 18 L. R. A. 170, an elaborately argued case, where the father made gifts *mortis causa* to his two daughters, which gifts were not more explicit than in the case at bar, the court laid down the rule as follows:

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"The factum of the gift in this case, being clearly and conclusively proved, as, we think, it indisputably has been, it only remains to state the law and apply it to the facts proved. They show all the essential attributes of constituent elements of a *donatio mortis causa*, as defined by the law and established by the course of adjudication. The gift was made *in periculo mortis*, under the apprehension of death as imminent; and it was of the personal property such as, under the law, may be the subject of a gift *mortis causa*. Possession or delivery was made at the time of the gift; and the donor died of that illness in a few hours after the making of the gift; thus the gift, inchoate, conditional, and defeasible when made, became absolute at the donor's death. Delivery is essential; it may be either actual, by manual tradition of the subject of the gift, or constructive, by delivery of the means of obtaining possession. Constructive delivery is always sufficient when actual, manual delivery is either impracticable or inconvenient;" citing many cases.

In *Kimball v. Leland*, 110 Mass. 325, where A, a depositor in a savings bank, delivered to B her bank book and an order for the payment of the whole deposit, for the purpose of transferring the money to B, held that although B did not present the bank book and order to the bank until after A's death, the transfer to her was complete, as against the next of kin of A, the court saying:

"There being no creditors whose rights could be affected by it, the transfer was equally effectual, whether it was a gift without consideration, or made for a legal consideration."

We cite this case as showing the distinction that is maintained in cases of this kind, where the interests of creditors are involved, and where they are not. "The gift of a savings bank book is in effect a gift of the deposit." *Providence Institution v. Taft*, 14 R. I. 502.

In *Crook v. First Nat. Bank of Baraboo*, 83 Wis. 31, 52 N. W. 1131, 35 Am. St. 17, it was held that where a depositor addressed the following note to a bank, "Please let my nephew have the amount of the within bill," describing the bill, coupled with its delivery so indorsed to such nephew, with the intention of giving him the fund in bank, such action operates as a valid gift of such fund, and justifies the bank in paying it to such donee on presentation of the writing. This, it seems to us, was in effect nothing more than a check for so much money, where no indorsement or assignment could make it any stronger. In the course of the discussion of this case the court cited *Basket v. Hassell*, 107 U. S. 614, 2 Sup. Ct. 415, and said:

"The law favors free and comprehensive power of disposition by an owner of his property, and the rigor of the earlier cases has been materially relaxed, both as to the subjects of such gifts, and as to what will serve as a delivery to make them effectual. This is well illustrated by the cases above cited, in which it is held that the thing given must be delivered, or it must be placed in the power of the donee by delivery to him of the means of obtaining possession;"

citing many cases where it was held that a deposit in a savings bank may be the subject of a valid *donatio mortis causa*, as well as of a gift *inter vivos*. It is also said in this case:

"It is well settled that in order to constitute a valid assignment of a debt or other chose in action, in equity, no particular form of words is necessary. Any words which show an intention of transferring or appropriating the chose in action to the assignee for a valuable consideration are sufficient; nor is any written instrument required. Any order, writing, or act which makes an appropriation of the fund amounts to an equitable assignment, and an oral or written declaration may be as effectual as the most formal instrument."

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In *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178, in sustaining a gift of this kind, it was said:

"The confusion, if any, which is found in some of the text-books is partly due to an attempt to draw unreal distinctions between these and other strictly analogous transactions. They are neither more nor less than a branch of voluntary gifts and settlements; and in the case of choses in action, fall generally under the doctrine of trusts and equitable assignments. The cases are abundant where such transactions have been maintained, where the technical phrase *donatio causa mortis* is not referred to. If there could be any doubt on the subject, it would seem to be, not whether the securities must be delivered, but whether the memorandum of transfer must be delivered. The paper in question here, if actually delivered, would have been a sufficient assignment on its face to pass title, if so intended."

And as showing that the English courts have not uniformly followed this rule, in *Jones v. Lock*, L. R., 1 Ch. App. 25, Lord Cranworth was called upon to determine whether a gift had been completed where a father put a check for nine hundred pounds for a moment into the hands of his son, nine months old, saying, "I give this to baby for himself," and then took it away, and it was found among his assets after his death. He held that in the case before the court there had been no completed gift, but only because, on all the facts before him, he thought the father had no such intention; and he expressly recognized the doctrine that it would have been a valid declaration of trust if so intended. And he declares that all the authorities turn upon that question, whether what has been said was a declaration of trust or an imperfect gift, citing also *Penfold v. Mould*, L. R., 4 Eq. 562, where the court said,

"The same learned vice chancellor reviewed the doctrine very clearly, and declared that any undoubted

expression of intention to pass the property will make the grantor a trustee, although some formalities may be wanting. He declares the case of *Meek v. Kettlewell*, 1 Hare 464, which held a voluntary assignment of a chose in action an imperfect gift, to have been overthrown. He says: "That decision has been in effect overruled, and it is now held that any instrument may be a sufficient declaration of trust, no form being necessary; the only material question being, "Did the grantor, or did he not, mean at once to pass the property."'"

"Deceased, while ill and in expectation of death, handed to defendant a savings bank book, saying that, after the payment of the doctor's bill and funeral expenses, the balance of the money was to be equally divided between defendant and his brother and sister. Defendant accepted the bank book, and deceased died the next day. Held, that there was a valid gift *causa mortis*." *Loucks v. Johnson*, 24 N. Y. Supp. 267.

"A good gift *causa mortis* is shown where it is proved that money on deposit in bank was given to plaintiff, and that the bank book to enable her to get the money was actually delivered to her by the donor, who at the time was in expectation of impending death, and who did die a day or two afterwards." *Walsh v. Bowery Sav. Bank*, 7 N. Y. Supp. 669.

In *May v. Jones*, 87 Iowa 188, 54 N. W. 231, held, that, when the delivery of a check is coupled with an intent to transfer a present interest in the money represented thereby, and no revocation is attempted, the intention of the donor will be given effect, and the transaction be held to transfer a present interest, and a right to the payment of the check after death, as well as before, and that, too, whether it is a mere gift or given for a consideration.

"Where a check was drawn for the full amount of decedent's deposit, under circumstances which showed it was intended as an assignment of the fund, it passed

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title of the fund to T." *In re Taylor's Estate*, 154 Pa. St. 183, 25 Atl. 1061.

To the same effect are, *Dobinson v. Emmons*, 158 Mass. 592, 33 N. E. 706; *Schollmier v. Schoendelen*, 78 Iowa 426, 43 N. W. 282, 16 Am. St. 455; *Ridden v. Thrall*, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. 758, 11 L. R. A. 684; *Gardner v. National City Bank*, 39 Ohio St. 600; *Coates v. First Nat. Bank*, 91 N. Y. 20; *Smith v. Sands*, 17 Neb. 498, 23 N. W. 356, and a great array of other cases too numerous to mention.

As showing the view taken by eminent authors on this subject, we quote from 2 Story's Eq. Jur. (13th ed.) 363, where, after discussing the legal propositions involved, the author says, at § 1044:

"But in cases of this sort the transaction will have a very different operation in equity. Thus for instance if A having a debt due to him from B should order it to be paid to C, the order would amount in equity to an assignment of the debt and would be enforced in equity although the debtor had not assented thereto. The same principle would apply to the case of an assignment of a part of such debt. In each case a trust would be created in favor of the equitable assignee on the fund, and would constitute an equitable lien upon it.

So that, regardless of equitable definitions, or whether it may be properly termed an assignment or not, if a trust is created which in equity constitutes an equitable lien upon the fund, the law vindicates the right of a person to make such disposition of his estate as to him might seem equitable and just. The same author, in Vol. 1, § 607, after discussing some of the cases, says:

"But it may admit of doubt whether the doctrine of these last cases can now, upon principle, be supported: for the ground upon which courts of equity now support donations *mortis causa* is not that a complete prop-

erty in the thing must pass by the delivery, but that it must so far pass by the delivery of the instrument as to give a title to the donee to the assistance of a court of equity to make the donation complete."

Mr. Daniel, in his first volume on Negotiable Instruments, reviewing this question, in § 20, says:

"The doctrine of equitable assignment is the creature of courts of equity, and the phrase 'equitable assignment' is used because, by the technicalities of pleadings at law, no legal assignment can be effectuated. No assent of the debtor is necessary to an assignment of the debt. Notice to him is all that is essential to affect him with liability to respect the assignment, and so far does equity regard the justice of this principle that it is applied even where an integral debt is broken up into fragments. Now, then, if A have \$1,000 in the hands of B, and draw a bill directing B to pay \$1,000 to C, or order, on demand, there can be no fair inference from the transaction but this: that A intended to assign the debt due to him by B to C, and for the bill to stand in B's hands as evidence of the acquittance. It is the intention to assign that makes the assignment. And after presentment of the bill to B, which is notice, what sound principle of law could be violated, and what equitable right impaired, by holding that an assignment is effected so as to bind the debt in equity, and bind B to respect it . . . ?"

The same author, in the second volume, § 1643, says:

"We have seen already that a check operates as an assignment of the fund on which it is drawn *pro tanto*, from the very time it is drawn and delivered, as between the drawer and the payee or holder."

And Morse on Banks and Banking, states in § 496 as follows:

"The plain common sense of the holder's rights would seem to be,—That as to the drawer, and those claiming under him otherwise than as bona fide holders for value,

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the check is to be sustained as a transfer of the fund against which it is drawn to the amount for which it is written. The same reasons of good faith and security in business transactions which induce the law to sustain a bona fide sale of property, or assignment of bills or notes, against a subsequent assignee in insolvency of the assignor, apply to the case of a check."

Believing that not only the overwhelming weight of authority, but the overwhelming weight of reason, is in favor of sustaining a gift *mortis causa*, at least in a case like the one at bar, where there is no controversy with creditors or subsequent donees or assignees of the donor, the judgment will be reversed, and the court instructed to render judgment for the amount in the bank, over and above the expenses of the administration, in favor of appellant.

FULLERTON, C. J., and ANDERS, MOUNT, and HADLEY, JJ., concur.

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41	686
41	687

J. B. BENNETT, as Receiver of the Puget Sound Loan,
Trust & Banking Company, Respondent, v.

CHESTER THORNE et al., Appellants.¹

APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY—ACTION IN EQUITY—PROCEEDING TO ASSESS STOCKHOLDERS IN INSOLVENT BANK. A proceeding to assess stockholders of an insolvent bank upon their superadded liability to creditors, instituted by the petition of the receiver, filed in the receivership action, is an equitable proceeding, and an appeal lies to the supreme court from the order levying the assessment irrespective of the amount in controversy, since it is only in civil actions at law for the recovery of money that the appellate jurisdiction is limited by the amount.

APPEAL—PARTIES ENTITLED TO APPEAL—ASSESSMENT OF BANK STOCKHOLDERS. Stockholders of an insolvent corporation are par-

¹Reported in 78 Pac. 936.

ties entitled to appeal from an order levying an assessment upon their liability to creditors, entered upon a petition filed in the receivership action, where they were, by order of court, served with notice of the hearing, and appeared and contested the matter as stockholders, although they were not nominal parties to the action, and were not named in the petition for the assessment, and the question as to who held the stock was not determined; since the special proceeding affected the rights of stockholders and concluded all who were before the court at the hearing.

APPEAL AND ERROR—APPEALABLE ORDERS—SPECIAL PROCEEDING TO LEVY ASSESSMENT AGAINST STOCKHOLDERS. Where the right to levy an assessment against stockholders of an insolvent bank, and the amount of such assessment, is determined by the court upon a petition filed in the receivership action, after notice to the stockholders and a hearing, at which the stockholders appeared and demurred to the petition and evidence was introduced in support of the allegations, the order fixing the amount and levying the assessment, is appealable as a final order or judgment in a special proceeding in which the receiver for the creditors on the one hand, and the stockholders on the other hand, are the adverse parties and finally concluded by the matters determined in the order.

BANKS—LIABILITY OF STOCKHOLDERS TO CREDITORS—LIMITATION OF ACTIONS—WHEN RIGHT OF ACTION ACCRUES. The superadded liability of stockholders to the creditors, under the constitution, attaches and a right of action thereon accrues to the receiver immediately upon the declared insolvency of the bank.

PRINCIPAL AND SURETY—LIMITATION OF ACTIONS—ACCRUAL. A cause of action against a surety accrues upon the default of the principal.

BANKS—LIABILITY OF STOCKHOLDERS TO CREDITORS—LIMITATION OF ACTIONS—EXHAUSTING ASSETS OF INSOLVENT CORPORATION. The rule that the stockholders' liability to creditors for the debts of the corporation is secondary has no application to the limitation of actions, but only to the equitable application of the funds, and does not require that the primary assets be exhausted and applied before recourse be had against the stockholders.

LIMITATION OF ACTIONS—TOLLING THE STATUTE—STOCKHOLDERS' LIABILITY—DELAY OF RECEIVER. It is against the policy of the law to put it within the power of a party to toll the statute of limitations, and the failure of a receiver to take the necessary steps to enforce the stockholders' liability does not prolong the statute; hence where no steps are taken until the assets are all exhausted,

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seven years after the receiver's appointment, the right of action is barred.

BANKS — STOCKHOLDERS' SUPERADDED LIABILITY — ASSESSMENTS. Constitution art. 12 § 11, providing the additional liability of stockholders in banking corporations, does not require the levy of any assessment as a condition precedent to action against the stockholders, and the right of action is not postponed until an assessment is made, as in the case of stock subscriptions and cases under the national banking act.

Appeal from an order of the superior court for Whatcom county, Neterer, J., entered Feb. 9, 1903, levying an assessment against the stockholders of an insolvent bank, after overruling their demurrers, and a hearing upon the merits upon the petition of the receiver, filed in the receivership action. Reversed.

F. S. Blattner and Harvey L. Johnson, for appellant Thorne.

T. O. Abbott, for appellants McClaine et al.

Brown & Rose, for respondent.

FULLERTON, C. J.—This is a proceeding to assess stockholders of an insolvent bank upon their superadded liability to creditors, as imposed by the state constitution, instituted by a petition of the receiver filed in the receivership action.

The Puget Sound Loan, Trust & Banking Company was incorporated under the laws of this state in 1890 to do a banking business at Whatcom, and was engaged in such business in 1895, at which time it became insolvent. In November, 1895, Charles W. Roberts commenced an action against the bank, in the superior court for Whatcom county, for the purpose of having a receiver appointed, and on December 7, 1895, the respondent, J. B. Bennett, was appointed receiver, and ever since has acted as such, under the orders of the court in that action.

On the 7th day of November, 1902, the respondent filed, in the receivership action, his duly verified petition, alleging that he was, on the 7th day of December, 1895, duly appointed receiver of the bank, and of all its property and assets of every kind and character; that by the order appointing him, he was authorized and empowered, in his own name as such receiver or in the name of the corporation, to commence and prosecute all suits, actions, and proceedings that to him might seem necessary or proper for the enforcement of any and all rights, claims, or demands of the corporation or its creditors; that the capital stock of the bank was \$125,000, divided into 1,250 shares of the par value of \$100 each; that the same was held by divers persons, some of whom were residents and some nonresidents of the state; that the stock was all duly subscribed and paid for, as he was informed and believed; that the debts of the corporation were in excess of \$55,000, all of which (except \$1,000) had been duly allowed as claims against the corporation; that the amount of debts of a strictly banking character then remaining unpaid was \$32,102.97, with interest thereon at the rate of six per cent per annum from the date of the receivership.

The petition further alleged that all the assets of the corporation had been reduced to cash, the last assets being sold February 15, 1902; that, during the receivership, dividends for the creditors had been declared by the court and paid, amounting to thirty-two per cent of the claims, and that most of the creditors had received such dividends, and receipted therefor. The petition concludes with the allegation that the corporation is insolvent, and that, aside from the superadded liability of stockholders prescribed by the constitution, it is unable to satisfy or discharge the debts or claims of its creditors; that no proceedings had as yet been had

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in any court for the enforcement of this superadded liability, and that it was necessary, in order to pay the debts of the corporation, to enforce such liability.

The prayer of the petition was, that the amount of the debts of the corporation be ascertained; that the court ascertain the amount necessary to be collected from each stockholder in order to satisfy and discharge such debts; that the court make an order in the action assessing such stockholders upon such liability, and that they each be adjudged to be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of the corporation, accruing while they remained such stockholders.

Upon the filing of this petition, November 7th, 1902, the court made an order fixing the 8th of December, 1902, as the time for hearing the same, and requiring the receiver to cause a copy of the order to be served personally upon all stockholders residing in the state of Washington, at least twenty days prior to the time set, and also requiring a copy to be served by mail upon all nonresident stockholders.

On the day of the hearing, the appellants, Chester Thorne, A. F. McClaine, and Alfred Coolidge, appeared and filed, as stockholders in the corporation, written demurrers to the petition of the receiver, upon the grounds, (1) that the petition does not state facts sufficient to authorize an assessment to be levied against them, and (2) that the proceeding was not commenced within the time limited by law. Various other stockholders also appeared and contested the assessment, and, together with the appellants, objected to the introduction of any evidence upon the grounds stated in the demurrers. These objections were overruled, and the court proceeded to examine witnesses and hear the evidence in support

of the allegations of the petition, and thereafter made and entered its findings of fact substantially as the same were stated in the petition, and, as a conclusion of law therefrom, found that the assessment should be levied against the stockholders. The court further found that all of the assets of the corporation were exhausted, "the last of which were disposed of on or about the 15th day of February, 1902;" that the debts of a strictly banking character then due amounted to \$32,102.97, with interest on the principal sum at six per cent from November 22, 1895, amounting to \$13,804.27, making a total of principal and interest for such debts of \$45,907.24; that, in order to pay the same, an assessment of thirty-six and seventy-two one hundredths per cent was necessary to be made on all who were stockholders at the time the debts were incurred, making \$36.72 per share; and that all of the debts were incurred prior to the 22nd day of November, 1895, the time of the receivership. A decree was entered accordingly, as follows:

"Now Therefore, by reason of the law and the premises aforesaid, it is hereby ordered, adjudged and decreed that each, all and every of the stockholders of the Puget Sound Loan, Trust & Banking Company, who were such at the time the debts found by the court in its findings of fact accrued, be and they are hereby, equally and ratably and not one for another, assessed on their statutory liability as such stockholders, to the amount of 36 72-100 per cent of the par value of the capital stock of said Puget Sound Loan, Trust & Banking Company held by each of said stockholders, as shown by the books of said company.

"And it is further ordered that written or printed notice of this assessment be given to each of said stockholders, which notice shall be sent by mail to the place of residence of said stockholders as shown by the books of said bank, or as known to the receiver, and that said as-

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assessment be and is hereby made payable to J. B. Bennett, as receiver of the Puget Sound Loan, Trust & Banking Company, on or before the 12th day of March, A. D. 1903.

"Done in open court this the 9th day of February, A. D. 1903."

The respondent moves to dismiss the appeal upon the ground that the amount in controversy was not shown to exceed the sum of \$200 in the case of any one stockholder, and several cases are cited to the point that the record must affirmatively show, where parties whose interests are several separately appeal, that the amount in controversy exceeds \$200 in the case of each appellant. The appellants seem to concede that the amount in controversy should exceed \$200, but claim that it is the total amount in controversy which controls the jurisdiction. But neither contention is material here. It is only in civil actions at law for the recovery of money in which the jurisdiction of this court on appeal is limited by the amount in controversy. This is clearly an equitable proceeding, and the appeal lies to this court irrespective of the amount in controversy. *Fox v. Nachtsheim*, 3 Wash. 684, 29 Pac. 640; *Blake v. State Sav. Bank*, 12 Wash. 619, 41 Pac. 901; *Fenton v. Morgan*, 16 Wash. 30, 47 Pac. 214; *Campbell v. Simpkins*, 10 Wash. 160, 38 Pac. 1039; *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571.

The respondent moves to dismiss the appeal on the further ground that the appellants are not parties to the action or proceeding; the contention being that the corporation is the only defendant, that the stockholders are not named in the petition, and that there is nothing in the case to show that the appellants are stockholders, no proof having been taken on that point. The petition in this proceeding certainly relates to the rights of stockholders, and they were, by order of the court, duly served with notice requiring

them to appear at the hearing, and the order finally entered recites the names of the stockholders who were so served, and it further appears that the appellants appeared as stockholders and contested the proceeding instituted by the petition. We think that this makes them parties to the special proceeding instituted by such petition. If the order or judgment is of conclusive effect for any purpose, it must be because it is binding upon the stockholders, and, if the stockholders are bound by the final conclusion, they are certainly parties to the proceeding.

The respondent also moves to dismiss the appeal on the ground that the order appealed from is not a final order or judgment. No cases are cited upon this proposition, but the appellants in reply cite the case of *Shuey v. Adair*, 24 Wash. 385, 64 Pac. 536, as holding that such an assessment order as was made in this case would not be held void in a collateral attack, and as intimating that a direct appeal might lie therefrom. This raises the most serious question on the motion to dismiss.

The order is not appealable unless it is a final order or judgment. It is held by this court in *State ex rel. Newland v. Superior Court*, 16 Wash. 444, 47 Pac. 965, that an order directing a sale and distribution of assets of an insolvent was appealable as a final order in that particular proceeding. So, also, it was held that an order, made in a receivership, directing the sale of the rolling stock of a railroad corporation and determining the preference of the claims of certain creditors, is appealable as a final determination of the title to the property. *Radebaugh v. Tacoma & Puyallup R. Co.*, 8 Wash. 570, 36 Pac. 460; and in *Tompson v. Huron Lumber Co.*, 5 Wash. 527, 32 Pac. 536, we held that an order allowing or disallowing compensation to a receiver is a distinct proceeding as to the amount allowed, and appeal-

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able as a final order. See, also, *Slater v. Stevens County Bank*, 12 Wash. 488, 41 Pac. 168; *Horton v. Barto*, 17 Wash. 675, 50 Pac. 587; *Wilbur v. Wilbur*, 17 Wash. 683, 50 Pac. 589. In the case of *In re Frasch*, 5 Wash. 344, 31 Pac. 755, 32 Pac. 771, it was held that an order making a partial distribution of an estate, and that a secured creditor be paid a dividend only after having first exhausted his security, was appealable as a final order; and we have frequently held that orders requiring the payment or application of funds in the registry, or under the control, of the court were appealable as final orders respecting the matters determined, although no final judgment had been entered in the case. *State ex rel. Schloss v. Superior Court*, 8 Wash. 696, 29 Pac. 202; *In re Hill's Heirs*, 7 Wash. 421, 35 Pac. 131; *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89, 42 Pac. 548.

The same rule seems to prevail in other jurisdictions. In *Wabash etc. Canal v. Beers*, 1 Black 54, the supreme court of the United States held that an order adjudging that the defendant pay a certain sum into court within a limited time, or that in default thereof the court will appoint a receiver, is appealable as a final decree. The court said: "It is positive, and not alternative. It leaves no question of right between the parties open for future adjudication. The decree orders the money to be brought into court within a limited time, and the court warns the defendants that if they fail or make default a particular measure will be taken to compel obedience. There is no want of finality here." In *Cook v. The Citizens' Nat. Bank*, 73 Ind. 256, it was held that an order made upon the report of a receiver requiring a party to bring money into court is appealable as a final order. And the same is held in *Succession of*

Thompson, 14 La. Ann. 810. In *Central Trust Co. v. Madden*, 70 Fed. 451, in an opinion by Fuller, sitting as circuit justice, it is held that an order decreeing the priority and preference of certain claims, and declaring that they must be provided for and secured in any order of sale thereafter to be made, is a final order and appealable as such. In *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. 136, which was an appeal from an order confirming an account of a receiver, and which the court called "a side issue in the case, in which the complainants on the one side and the receiver on the other were the real and interested parties," the court said:

"The decree confirming the auditor's report was, as to this matter, a final decree against the complainants, and in favor of the receiver. . . . The receiver, though not a party in the principal suit, was an officer of the court, appointed in the suit, and was a principal party to the particular question raised by the proceedings referred to,"

and refused to dismiss the appeal. In *Grant v. Los Angeles etc. R. Co.*, 116 Cal. 71, 47 Pac. 872, it was said that an order fixing a receiver's compensation, while not nominally one from which the statute authorizes a direct appeal, yet,

"Such an order, however it may be designated, is, in legal effect, 'a final judgment upon a collateral matter arising out of the action,' and is 'appealable by any party interested in the fund.' (*Grant v. Superior Court*, 106 Cal. 324, [39 Pac. 604,] and cases there cited.) The appellant has such an interest."

While one of the tests as to the finality of an order is thus stated by Spelling,

"An important, and, in fact, the only reliable test of the question whether an act of the court is its judgment or only an order is the answer to the inquiry whether

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it disposes of all the material issues raised by the pleadings between all the parties, so far as it is within the power of the court to dispose of them,"

yet it was further said:

"It is not necessary, however, to the finality of a judgment, that it dispose of all the rights of the parties pertaining to the subject matter of the litigation. It is final if it dispose of such rights and interests as are involved in the action or proceeding in which it is made, aside from the question of whether the same rights, or others not in issue, might be, or are even then being, litigated elsewhere." 2 Spelling, New Trial and Appeal, Sec. 482, pp. 995, 998.

Tested by the foregoing rules, it seems to us that the matter before us is a special proceeding, collateral to the main suit, in which the receiver, as the representative and trustee of the creditors on the one hand, and the stock holders on the other hand, were the parties adversely interested, in which a decree was entered which affects a substantial right of the stockholders. Two main questions were put in issue by the proceedings, and finally determined by the court, viz., (1) the right of the creditors represented by the receiver to have an assessment, that is, whether any assessment could be properly levied at that time; and (2) the amount of the assessment. Testimony was heard, and the stockholders availed themselves of an opportunity to cross-examine witnesses upon the subject of the amount of the assessment, and the court finally decreed the amount of the bank debts of a strictly banking character then existing. Upon that point the decree must be considered final, at least as to all parties regularly before the court and contesting that question. If the court had power to finally determine the exact amount of the assessment, certainly it ought to have had power to determine the receiver's right to

any assessment at all, for it would be idle to determine the amount, if the right did not exist.

That the decree is one from which an appeal will lie becomes more apparent when viewed from the aspect of an adverse decision. Suppose, for instance, it had appeared on the face of the petition that the last of the assets had been exhausted and applied more than six years before the petition for the assessment was filed; doubtless the court would have sustained the demurrers on the ground that the right to prosecute this remedy had accrued more than six years ago; but that is exactly what the appellants are contending now appears from the face of the petition. Suppose, further, that the demurrers had been sustained, and the proceeding dismissed, on the ground that an assessment could not be properly levied at this time by reason of lapse of time; no one would doubt the receiver's right to appeal as from a final order; and, if a decree will give one party a right to appeal, when adverse to him, it must confer the same right on the other under a like condition. *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469; *Taylor v. Spokane Falls etc. R. Co.*, 32 Wash. 450, 73 Pac. 499. On the whole, therefore, we think that an appeal lies from the decree in the case before us, and that the cause is here for determination upon its merits.

The principal point made by the appellants in the court below, and the only one we shall discuss, is that the enforcement of the stockholders' liability is barred by the statute of limitations; and this resolves itself into the question, when did the right of action accrue?

Our constitutional provision is entirely silent as to when, or at what moment, the superadded liability therein provided for attaches. In that particular it is not unlike the constitutional or statutory provisions in many other

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states which create a similar liability, and, measured by the standard announced in such other states, there would seem to be but little doubt upon the question. In nearly all of them, where the law creating the liability is silent as to the time when the cause of action accrues, it is held that the right of action accrues immediately upon the insolvency or like default of the corporation. *Hawkins v. Furnace Co.*, 40 Ohio St. 507; *Barrick v. Gifford*, 47 Ohio St. 181, 24 N. E. 259, 21 Am. St. 798; *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401, 5 South. 120; *First Nat. Bank v. Greene*, 64 Iowa 445, 17 N. W. 86, 20 N. W. 754; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Shellington v. Howland*, 53 N. Y. 371; *Hunting v. Blun*, 143 N. Y. 511, 38 N. E. 716; *Hirshfeld v. Bopp*, 145 N. Y. 84, 39 N. E. 817; *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263; *McKusick v. Seymour etc. Co.*, 48 Minn. 158, 50 N. W. 1114; *Crease v. Babcock*, 10 Met. 525; *Grew v. Breed*, *id.*, 569; *Commonwealth v. Cochituate Bank*, 3 Allen 42; *Baker v. Atlas Bank*, 9 Met. 182; *Younge v. Lime Co.*, 49 Ohio St. 663; *Terry v. Tubman*, 92 U. S. 156; *Terry v. Anderson*, 95 U. S. 628; *Carrol v. Green*, 92 U. S. 509; *Freeland v. McCullough*, 1 Denio 414; *Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354; *State ex rel. Stone v. Union Stock Yards St. Bank*, 103 Iowa 549, 70 N. W. 752, 72 N. W. 1076; *State Savings Association v. Kellogg*, 52 Mo. 583; *Gibbs v. Davis*, 27 Fla. 531, 8 South. 633; *Todhunter v. Randall*, 29 Ind. 275; *Sleeper v. Norris*, 59 Kan. 555, 53 Pac. 757; *Hicks v. Burns*, 38 N. H. 141; *New England Com. Bank v. Stockholders*, 6 R. I. 154, 75 Am. Dec. 688.

There are a number of obvious reasons for the rule. By the terms of the constitution, the stockholders are made liable *in praesenti*, and there is no postponement,

express or implied, by the imposition of any condition precedent. The language of the provision is,

"Each stockholder of any banking corporation . . . shall be individually and personally liable, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation . . . accruing while they remain such stockholders, to the extent of the amount of their stock therein . . . in addition to the amount invested in such shares." Const. art. 12, § 11.

It is true that, under the decisions in *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939, and *Watterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041, the liability is held to be secondary, and not primary, and that, in the event of the insolvency of the corporation, the fund created thereby becomes a trust fund for the benefit of creditors, to be enforced only by the receiver; but this, it seems to us, ought not to be held to affect the question as to the time the action accrues; and, in the great majority of the cases above cited, it is held that it does not. As the liability becomes a trust fund upon the insolvency of the corporation, insolvency must be the event that gives rise to the liability, and places it within the reach of the receiver; and, this being true, it must logically follow that the cause of action accrues at the same time. A right of action ordinarily accrues by reason of some wrong, default or delict of the defendant—his infringement of a right of the plaintiff, or a failure in duty he owes to the plaintiff. "The elements of any cause of action are: (1) A right possessed by the plaintiff; (2) and infringement of such right by the defendant." "A right claimed or wrong suffered by the plaintiff, on the one hand, and the duty or delict of the defendant on the other." *Atchison, etc., R. Co. v. Rice*, 36 Kan. 593, 14 Pac. 229; *Rodgers v. Mutual Endowment Asso.*, 17 S. C. 410; *Veeder v. Baker*, 83 N. Y. 156; *Pomeroy on Remedies*,

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§ 452 (1st ed.). And according to Webster's or Bouvier's definitions of "accrue," it is sufficiently accurate to say that, when the two elements constituting a cause of action, viz., a right possessed by the plaintiff on the one hand, and the infringement thereof or delict of the defendant on the other hand, both co-exist—"arise, happen or come to pass"—they are combined, and a cause of action accrues at that moment. An adjudication of insolvency, legal dissolution, or a general assignment, any declared or *de facto* insolvency of the corporation, amounts to and is a refusal to perform all obligations. These events, in the nature of obligations repudiated and duties unfulfilled, are "delicts" or defaults of the defendant, and when they come into existence they are combined with the pre-existing right of the plaintiff, and a "cause of action" "accrues" against the corporation on all its obligations, within the strict and literal sense of those terms as above defined. ". . . The claims . . . growing out of the insolvency of the defendant, and the repudiation of its duty . . . by a discontinuance of its business, are debts due *in praesenti* upon the dissolution of the corporation." *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401, 5 South. 120.

"The stoppage of payment by the bank gave at once the right of action. It had never refused payment before. It was in no default until the day indicated, when it closed its doors, and by its acts spoke as significantly as words to that effect: 'We refuse to pay any one. It is useless to present your bank-book or demand, as we cannot pay.'" *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110.

Immediately upon the declared insolvency of the corporation there is a general default, by which every creditor is disastrously affected. We think the true intent

and purpose of the constitution is to insure against this identical disaster by providing for a liability to arise in the event of it. "The creditors were at that time [upon insolvency] in the position of one to whom an obligation is due on demand, or who can make demand upon the doing of an act himself." *Franklin Sav. Bank v. Bridges*, (Pa.) 8 Atl. 612. The insolvency "fixes the liability of the stockholders." *First Nat. Bank v. Greene*, 64 Iowa 445, 17 N. W. 86, 20 N. W. 754; *Tibballs v. Libby*, 87 Ill. 145. Such an event is the delict or default of the corporation, and it must also be the delict or default of any other person who has bound himself for the performance of the same duty. The relation of cause and effect between the event of insolvency and the resulting liability is obvious, and naturally we expect to find a "cause" in the "event" from which every right of action accrues. Stockholders stand as sureties for the debts of the corporation, and the default of the principal is the default of the surety. It is invariably held that the cause of action against a surety accrues upon the default of the principal. See *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661, 67 Am. St. 733. In that case this court says: "The liability arose when he [the principal] neglected or refused to make such payment. Certainly, the cause of action against the sureties accrued at that date."

It has often been claimed that there is no liability until the corporate assets have been exhausted and actually applied. But the rule as to the secondary nature of the liability, as we have above indicated, has no application to the statute of limitations; it is merely a rule for the equitable application of the funds. We have seen that our constitutional provision prescribes no such condition precedent, but creates a liability *in praesenti*; and,

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while the delict or wrong of the stockholder may be said not to arise until there is a default or wrong by the corporation, that certainly is as long as the enforcement of the liability can be postponed with safety or justice. We do not think that the voluntary act of the receiver, in paying out the last dollar of the primary assets, creates or causes the duty of the stockholders, under this constitutional provision. The liability for the payment is not made to depend upon the application of assets, as these are but the conditions that accurately fix the extent of liability; not the delict that creates it. And an order of court can not create the liability. The order does not pertain to the right of action, but only to the evidence required to establish it.

Again, it has been many times held—and this is another important reason why the action should be held to be barred—that it is not the policy of the law to put it within the power of a party to toll the statute of limitations. And this court has at least twice held that the failure of a party to take the necessary steps to perfect his right of action, although such steps were conditions precedent to the right, would not prolong the statute. *Spokane County v. Prescott*, *supra*; *Spinning v. Pierce County*, 20 Wash. 126, 54 Pac. 1006.

As we have above indicated, it is the respondent's contention that the statute of limitations did not begin to run against the liability until the date of the decree ordering the assessment, and a number of cases are cited in support thereof. The cases cited, however, with one exception, are not in point. They relate to the stock subscription liability, or to national bank cases, both of which are governed by entirely different principles from those controlling the liability created by the constitution. The necessity of a call and assessment, on unpaid stock

subscriptions, is based solely on the express contract of the parties. *Scovill v. Thayer*, 105 U. S. 143; *Terry v. Anderson*, 95 U. S. 628. The contract of the subscriber to the stock is that he will pay upon a demand by the proper authorities of the corporation. And it has been invariably held that, as to the stock subscription liability, a call or demand must precede the suit. So, in the national bank cases, the amount of the liability in any given case is "to be determined by the comptroller of the currency" (U. S. Revised Statutes, § 5151); and this clause in the banking act was early construed to repose a discretion in the comptroller as to the amount which it would be necessary to demand of the shareholders, and, consequently, to require that an assessment be levied by the comptroller before there was any liability. In *Kennedy v. Gibson*, 8 Wall. 498, 505, it is said:

"It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved."

See, also, *Sanger v. Upton*, 91 U. S. 56. This construction has never been questioned, and the practice which grew up at an early day, in levying assessments in

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national bank cases upon a superadded liability, as well as upon the stock subscription liability, has been invariably followed from that day to this. Some of the state courts have apparently fallen into the same practice, without making due reference to the statutory provisions to determine whether the state laws require such an assessment to be made or not. But our constitutional and statutory provisions do not require an assessment, neither do they contain any such provision as that contained in the national banking act just referred to; and these cases, we repeat, cannot be in point. The case cited that does support the contention, as well as certain others we have discovered supporting it, seems to us to be contrary not only to the great weight of authority, but contrary to correct principles also, and we must decline to follow them.

We conclude, therefore, that the contention of the receiver cannot be sustained; that the action against the stockholders accrued when the bank became insolvent, and should have been enforced within six years thereafter. As it has been nearly seven years since the right accrued, the right must now be held to be barred by the statute of limitations. The demurrers should have been sustained. The order appealed from is, therefore, reversed, and the case remanded, with instructions to deny the petition of the receiver and dismiss the proceedings.

MOUNT, ANDERS, and DUNBAR, JJ., concur.

TONY F. RICHARDSON, *Appellant*, v. LUCY F. RICHARDSON, *Respondent*.¹

DIVORCE—CRUEL TREATMENT—ADULTERY—BOTH PARTIES AT FAULT—DOWNFALL OF WIFE CAUSED BY HUSBAND. In an action for divorce brought by the husband upon the ground of adultery on the part of the wife, in which she applies for divorce upon the ground of cruel and inhuman treatment, it is not error to grant the wife a divorce, although the evidence indicates that she was guilty of adultery, where it appears that the husband by constant charges of infidelity, threats, blows, abusive language and frequent intoxication drove the wife from her home and was largely instrumental in causing her downfall, and they are unable to live together.

DIVORCE—DIVISION OF PROPERTY—SETTLEMENT OUT OF COURT INDUCED BY FRAUD. Where the parties to a divorce action have community personal property of the value of \$23,000, besides real estate, and pending the suit the wife is induced to sign an agreement whereby she accepted about \$2,500 as her portion of the property, and the evidence shows an armed attack, by the husband, upon the house in which she was living with a co-respondent, made the night before the settlement, threats of prosecution, misrepresentations, and that the wife was not apprised of her rights, the settlement is properly disregarded; since such settlements should not be enforced unless fairly made and reasonably just.

SAME—CUSTODY OF CHILDREN. Although both parents are unfit to have the custody of children of tender age, the exigencies of this case require that the older children be awarded to the father and the younger to the mother.

SAME—DIVISION OF PROPERTY. In an action for a divorce where the community personal property, consisting largely of stock, is worth about \$23,000, but the testimony as to value is exceedingly meager, and there was no testimony as to the value of large holdings of real estate, it is error, where the property should be evenly divided, to decree the payment to the wife of \$15,000 within sixty days, and the cause will be remanded for further evidence as to the value of the property and an even division thereof.

¹Reported in 78 Pac. 920.

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Appeal from a judgment of the superior court for Douglas county, Martin, J., entered July 24, 1903, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, and also from an order for alimony entered September 1, 1903, in an action for a divorce. Reversed in part and affirmed in part.

Merritt & Merritt, for appellant.

W. J. Canton, for respondent.

DUNBAR, J.—The motion to dismiss this appeal seems to be without merit.

This action was commenced by appellant against respondent for a decree of divorce. The complaint alleged infidelity on the part of the wife, and adultery committed with the co-respondent, Thomas Madden, and divers and sundry other men not mentioned; pleaded a settlement of the community property interests between the appellant and respondent prior to the commencement of the action; asked that the community property, which was accorded to the appellant under the terms of the agreement, be decreed to be his, and asked to be awarded the care, custody, and control of Anna C., Lora L., Ruby A., and David A. Richardson, children of appellant and respondent, and that the respondent be awarded the care and custody of Iva J. Richardson, the youngest child of the appellant and respondent. The respective ages of these children were, Anna C., fourteen years of age; David A., nine; Lora L., seven; Ruby A., three; and Iva J., seven months of age; all five of said children being then living.

The respondent answered, denying the allegations of adultery and misconduct on her part; and alleging, abuse on the part of the husband that became unbearable; that he was guilty of associating with disreputable women;

that he habitually charged her with infidelity with every man who came about the premises; that he habitually cursed and damned her and called her harsh names, and finally drove her from her home; denied that she had made any settlement of property rights of any kind or character, except through fear and misunderstanding, and asked that the care and custody of the children be given to her, and that the court make a decree setting over to and giving respondent one-half of all the real and personal property belonging to the appellant and respondent.

These parties were married in December, 1885, and lived together on their ranch until about October, 1902, at which time, it is insisted by the appellant, on account of the intimacy of respondent with Thomas Madden, they had some trouble, and respondent went to live at the town of Wilson Creek, where Madden lived, and where the appellant visited her from time to time, generally going down Saturday nights and remaining over Sunday with her, until the 12th day of March succeeding, being the 12th day of March, 1903. The court found, that the allegations made in the appellant's complaint as to the commission of adultery by the respondent on the 17th day of March, 1903, had not been proven in the case, and that the most that could be said was that the respondent may have acted in an imprudent and indiscreet manner; that, during the longer portion of the married life of the parties, appellant had neglected the respondent and had failed to show that treatment due a wife from her husband, and that at times his treatment had been such as to force the respondent to the conclusion that he cared nothing for her; that he indulged in calling her many vile names, and cursing and swearing at her and his children; that he was addicted to the use of

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intoxicating liquors, and often used the same to excess; that respondent had been faithful in all of her household duties; that, in the fall of 1902, appellant ordered the respondent, with their children, away from their home, whereupon they went from there to the town of Wilson Creek; that since said marriage the appellant and respondent have acquired, and now have, personal property of the value of \$23,000, consisting of about 450 head of cattle of the value of about \$15,000, and 1,500 head of sheep of the value of about \$4,500, and horses and other property of a personal nature of the value of about \$3,500; and have acquired real estate comprising 4,620 acres, together with certain lots and buildings in Coulee City, Douglas county, Washington, and Wilson Creek, Douglas county, Washington; that all of said property was acquired by the said appellant and respondent since said marriage, and is community property; that, about the time of the commencement of this action, the appellant did, through unwarranted means and without the respondent's being apprised of her rights and interest in the property—she being wholly ignorant of the law in the matter, or of her rights under the law—secure a purported settlement or agreement signed by respondent, in which she was to turn over to the appellant all the children save one, and all the property, for the paltry sum of \$2,500; found that the agreement was unfair, procured by unwarranted and unfair means, and so unconscionable that it should be set aside; found that the respondent in this action was a fit and proper person to have the custody and care of the minor children; and, as conclusions of law, that the bonds of matrimony be dissolved; that the respondent is entitled to one-half of all the personal and real property now owned by the appellant and respondent; that respondent is entitled to

the custody of the minor children, they being of tender age, and that the appellant have the right to visit and help support them, and that the contract in relation to the settlement be set aside. A decree was entered in substantial compliance with said conclusions, awarding the custody of all the children to respondent, and requiring appellant to pay into court for the benefit of respondent the sum of \$2,000, to be paid out only upon the order of the court; and within sixty days to pay in the further sum of \$13,000, for the use and benefit of the respondent, as a balance due the respondent from the community property, to be paid out upon the order of the court only; and making provision for the vesting of title in case of the payment of said money. From this judgment the appeal is taken.

The appellant presents numerous assignments of error, principally in relation to the refusal of the court to admit testimony, and in exceptions to the findings of fact. It is not necessary to discuss these assignments in detail, for the whole transaction was presented to the court in such a way that it is not difficult to conclude what the exact situation was. The evidence is fairly conclusive that the respondent was guilty of adultery with the correspondent Madden, or at least that her actions were such as to reasonably lead the husband to so interpret them; and, if the husband himself were guiltless there might be some reason for his claim that he should be entitled to a larger portion of the community property, and entitled to the custody of the children. But there are other crimes which affect domestic felicity than that of adultery, and the reading of this record convinces us that the husband was largely responsible for the wayward course eventually pursued by the wife. Constant charges of infidelity, habitual application of vulgar epi-

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thets and vile names to a wife, frequent intoxication and abuse, both by word and by blows (it being testified that at one time the husband kicked the wife in the barn because she was not able to successfully handle a vicious cow, and that he applied vile epithets to the wife the day after the birth of one of her children because she was not able to do the milking) harshness and inhumanity with the children, calling them the most vile names that one person could call another, names not fit for repetition in this opinion—such a course of conduct could only have the result to alienate the affections of the wife. The next natural result is the longing on the part of the wife for sympathy and companionship from somebody else, and, when that sympathy is proffered, it frequently happens, as we think it did in this case, that she tenders in return therefor the highest measure of reciprocation. And, while the law will not excuse crime of any kind, neither will it be too nice in its distinctions, and take from a wife, on account of her misdeeds, her share of the property which has been earned by her, and give it to a husband who, by his brutal nature and treatment, has been largely instrumental in her downfall.

From an investigation of the record, we think the court was right in setting aside the agreement or settlement with reference to the community property. It was contended by the respondent that the agreement was void, under the law, as being against public policy; but, while it was not a void agreement, it shows, by reference to the testimony in relation to the property generally, that it was not a fair agreement, the testimony of the wife being that it was an agreement which was forced upon her through threats and intimidation. This court has had this question under advisement in the case of *Timm*

v. Timm, 34 Wash. 228, 75 Pac. 879. In that case, quoting from *Mr. Bishop on Marriage and Divorce*, § 702, it is said:

"It is not *per se* a violation of the law's policy, therefore it is not necessarily nugatory, for the parties to a divorce suit to enter into an agreement as to what alimony shall be allowed, how their property shall be divided, and the like, on the rendition of a decree for dissolution or separation. But if the contract is of a sort to stimulate the divorce, to discourage any defense, or in any way to impose upon the court, it will be void; for example, it will be void if so framed as to have effect only on condition that divorce is granted without alimony. Hence practically, and almost and sometimes quite as a matter of law, an agreement of this sort should be laid before the judge, when, to an extent not readily definable, it will be ill if he dissents, and good if he approves."

In that case a citation was also made from the supreme court of Iowa, in *Martin v. Martin*, 65 Iowa 255, 21 N. W. 595, to the following effect:

"The courts however will in every case scrutinize the transaction very closely, and the contract will not be enforced unless it appears to have been fairly entered into, and to be reasonably just and fair to the wife."

This court continuing says:

"We see no just reason why this equitable rule should not be applied to such agreements made during the pendency of divorce suits, as well as to such contracts made in contemplation thereof. Furthermore, under our statutory provisions, *Pierce's Code*, § 4637, *Bal. Code*, § 5723, these proceedings with reference to the adjustment of the property rights between the spouses are regulated and determined by action of the court in that regard, and not by agreement between the parties. The courts will not lend themselves to anything that will encourage or facilitate divorces, by being too ready to

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recognize and enforce contracts between husband and wife adjusting their property rights, either before such proceedings are instituted or during their pendency."

There was a very earnest effort made by the appellant to show that the respondent signed this agreement upon condition that no further action should be taken against Madden. This testimony, which was offered several times, was rejected by the court. But if it had been proven that such was the case, it would have been an additional reason why the agreement should have been held null and void.

The night before this agreement was made, the appellant, with one Doyle, a sort of detective, and two other men, each armed with a revolver, slipped down to the house where the respondent was living, with the intention of surprising Madden by finding him in intimate relations with respondent. They broke the panels of the door, stuck their lanterns in where they could see, and claimed to have seen Madden hastily dressing near the bed occupied by the respondent. The respondent testifies that they came in brandishing their revolvers; Madden claiming that, in the mean time, he had been sleeping on the floor in the front room, but, hearing that they were hunting for him, thought discretion was the better part of valor, retreated upstairs and jumped out of a window. Mr. Doyle took it upon himself to run around the house and fire three shots at him, as he retreated returning the fire. Recriminations were indulged in between the husband and wife, the party leaving and returning again in an hour or two; then, after more talk, leaving again. The next morning, according to the testimony of respondent, Doyle came to her house, told her that he was an officer, and had a warrant for her arrest, and that she had better make a settlement with the appel-

lant, or things would go bad with her; and that she finally did settle for the amount of \$2,500 (as described in the agreement), a hack and the house in Wilson Creek, which seems to have been of little value, and which we think was probably the separate property of the respondent, although the record is not clear in that respect. These threats are denied by Doyle, but the fact remains that he took it upon himself to go and see the respondent for the purpose of obtaining this settlement, and we are satisfied, from all the testimony, as was the trial court, that it was obtained through misrepresentation and fraud, and that the wife was not made acquainted with her rights in the premises.

Unfortunately, so far as the children are concerned, we are forced to the conclusion that neither of the parties ought to have the care and custody of children of tender age; but, as there seems to be no alternative in this case, we have concluded to award to the care, custody, and control of the father the three oldest children, viz., Anna C., David A., and Lora L.; and to the care, custody, and control of the mother, the two youngest children, viz., Ruby A. and Iva J.

As to the division of the property, we are not satisfied that an equitable division was made. The testimony in relation to the value of the personal property is exceedingly meager. It would seem that it ought to have been more definite and certain; while there is no testimony at all in relation to the value of the large holdings of real estate. We judge, from what crops out in the record, that the court obtained some information relative to these values from outside sources, but this court cannot be controlled by such supposed information.

We therefore remand this case to the lower court, affirming the decree with relation to the divorce—as

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we think it is not possible for these parties to live together again in harmony—with the disposition, care custody, and control of the children as above indicated, and with instructions to take further testimony to the satisfaction of the court in any manner in which it sees fit, either by commission, or by deposition, or oral testimony, as to the value of the property; and, when such value is ascertained, to divide the property, as it existed at the time of the commencement of the action, equally between the husband and the wife, either by a division of the physical property itself, or by awarding a money judgment to the respondent for her share of the value of such property, making it a lien upon all the property of the estate until it is paid.

FULLERTON, C. J., and ANDERS, MOUNT, and HADLEY, JJ., concur.

[No. 5182. Decided December 20, 1904.]

ANNIE EVENDEN WHITE, *Appellant*, v. THE SEATTLE,
EVERETT & TACOMA NAVIGATION COMPANY
et al., *Respondents*.¹

CARRIERS—PASSENGERS—ROUND-TRIP TICKET—INJURY ON WHARF WHILE WAITING FOR RETURN. One who buys a round-trip ticket for passage upon a boat, and is injured while waiting upon the company's dock for the arrival of the boat to commence the return trip, must be regarded as a passenger on the boat, and the law governing common carriers applies.

CARRIERS—NEGLIGENCE—INJURY TO PASSENGER—DEFECT IN DOCK—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained in stepping through a hole in the defendant's dock, while plaintiff was waiting to board defendant's steamer, it is error to find that the defendants were not guilty of negligence, and that the plaintiff was guilty of con-

¹Reported in 78 Pac. 909.

tributory negligence, from the fact that the hole was not in a direct line from the entrance to the dock and the landing place, where it appears that the dock was about 100 by 80 feet in size, that the boat, as plaintiff well knew, landed near the center of the west side, that the hole, two feet long by four and one-half inches wide, was near the southwest corner of the dock, that the plaintiff, while waiting for the steamer, instead of going to the waiting room, walked about the dock within boundaries well defined by stringers, and stepped into the hole, in the dark, the place being one which passengers commonly frequented, and only about thirty feet from a straight line between the waiting room and landing place; since it is the duty of a carrier to maintain its dock in a reasonably safe condition, and passengers do not commonly confine themselves to any particular space while waiting in such places.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 4, 1904, upon findings in favor of the defendants, after a trial on the merits before the court, a jury being waived, dismissing an action for personal injuries sustained by a passenger in stepping through a hole in the floor of the dock. Reversed

McClure & McClure, for appellant.

Preston, Carr & Gilman, James M. Gephart, and Ira Bronson, for respondents. Appellant after passing the waiting room became a mere trespasser. *Watson on Damages*, § 284; *Gibson etc. Co. v. Sziepienski*, 37 Ill. App. 601; *Ritz v. City of Wheeling*, 45 W. Va. 262, 31 S. E. 993; *Dobbins v. Missouri etc. R. Co.*, 91 Tex. 60, 41 S. W. 62, 66 Am. St. 856, 38 L. R. A. 573. She assumed the risk in going to a place not intended for visitors. *Zoebisich v. Tarbell*, 10 Allen 385, 87 Am. Dec. 660; *McEachren v. Boston etc. R. Co.*, 150 Mass. 515, 23 N. E. 231; *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Wood v. Leadbitter*, 13 M. & W. 838. Appellant could only recover by proof of a custom to board boats at the south-

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west corner of the dock. *Farley v. Cincinnati etc. R. Co.* 108 Fed. 14. The appellant was guilty of contributory negligence in going to a place not intended for the use of the passengers. *Grand Tower etc. Co. v. Hawkins*, 72 Ill. 387; *Reeves v. French*, 20 Ky. Law 220, 45 S. W. 771, 46 S. W. 217; *Brady v. Pettyman*, 193 Pa. St. 628, 44 Atl. 919; *Watson on Damages*, § 261; *Reynolds v. Hindman*, 32 Iowa 146; 1 Thompson, Negligence, 303; *Dobbins v. Missouri etc. R. Co., supra*.

DUNBAR, J.—This is an action for personal injuries alleged to have been sustained. Appellant, who was residing in Seattle, had gone to Edmonds on one of the morning trips of the steamer City of Everett, and, having paid for a round trip, had a return ticket to Seattle from Edmonds. About eight o'clock on the evening of January 3, 1903, she went to the dock with the intention of returning on said steamer, expecting to take passage when the steamer arrived at Edmonds at 8:15. The night was dark, and she was accompanied by Guy Kingsbury, who carried a lantern. They reached the dock before the steamer arrived. After walking about the dock for a while, they went to the southwestern corner of the dock, and there appellant sat down upon the stringer running around the outer edge of the dock, while Mr. Kingsbury stood near, holding the lantern. While sitting there, the boat whistled, and appellant, stepping forward, stepped into a hole in the floor of the dock, some two feet long and four or four and a half inches wide, with such force as to jam her right foot and leg into the hole, and up to her knee. The floor of the dock had to be pried up to release her, and the damages she suffered were the result of this accident. Suit was brought for the sum of \$3,125.

The dock was about eighty by one hundred feet in size. A diagram in the briefs of both appellant and respondents, and the testimony, show that the dock was about one hundred feet from north to south. About the center of the west side of the dock, the steamers land. A water tank about ten feet wide is in the center of the dock, the steamers landing, when going north, on the north side of the water tank, and when going south, on the south side of the tank, leaving a space of about ten feet between the water tank and the end of a rack of wood, both on the north and south of the water tank. On the south side of the water tank, this rack of wood is about thirty feet long and eight feet wide, extending within twelve or fifteen feet of the south side of the dock. Another rack of wood of the same description was located on the south margin of the dock, about eighteen inches from the extreme southern portion of the dock, commencing some twelve or fifteen feet from the southwest corner of the dock, leaving a space between the nearest edges of the two different racks of wood of about eight feet, and a space inside of the dock and between the two racks of wood of from twelve to fifteen feet. It was in this space, between the south end of the rack of wood on the west side of the dock and the west end of the rack on the north side of the dock, that the accident occurred.

We think it must be conceded that the appellant was a passenger on the boat, and the law governing the duties of common carriers must be applied in her case. The testimony in the case is not very extensive, and concerning the facts there is very little dispute. The record shows that they were about as stated above. A jury was waived, and the cause was tried by the court. The

court found, that there was a waiting room located upon the dock; that the plaintiff went upon the dock for the purpose of embarking upon the steamer; that it was a dark, rainy night; that, instead of stopping at the waiting room, she passed between the said wood racks to the southwest corner of the dock; that she did not go to that corner for the purpose of taking the said boat at that place under a misapprehension as to the place where she would have to go to take the boat; that she knew well where the boat was to land, and where she would have to be in order to take the boat as a passenger, and that, in going around to the southwest corner of the dock, she was simply doing so for her own pastime; that in doing so she was guilty of gross negligence, which greatly contributed to her injury; that defendants were not guilty of negligence. As conclusions of law, the court found that judgment should be entered in favor of the defendants, and judgment was so entered. Hence this appeal.

We cannot understand upon what theory the court found that the defendants were not guilty of negligence. The law is too well settled to necessitate citing of authority that it is the duty of common carriers, whether of steamboats or railroads, to keep in reasonably safe condition wharves, docks, or platforms upon which passengers are invited for the purpose of boarding said cars or boats. The maintaining of a dock with a hole in it the size of the hole which was conceded to be in this dock was certainly negligence, for it was a peril to any one frequenting that portion of the dock.

Nor do we think that the appellant was guilty of contributory negligence in going to that portion of the dock to which she did go, under the circumstances. The testimony shows that it was common for passengers wait-

ing for the boat to frequent that part of the dock where the plaintiff was injured, and that it was frequented as much as any other part of the dock; and it is a matter of common observation and knowledge that people generally, while waiting for boats, move around more or less on different portions of the docks and platforms used by boats for taking on passengers, and do not confine themselves to any particular space directly in front of the entrance slip, or to the regulation little, stuffy, untidy waiting rooms which generally occupy some portion of the wharf. It would be impracticable and wrong, in the face of custom and of human nature, to hold that any one who deviated from a direct line from the entrance to a dock to the entrance of a boat was guilty of contributory negligence in case of an injury; and, if the theory of the respondents here is correct, any deviation at all which was unnecessary would constitute such negligence. The boundaries of this dock were well defined by the stringers or wall upon which the appellant sat, and which she testified was about two feet high. Her deviation from the straight line between the waiting room and the entrance slip to the boat was only about thirty feet. We think she had a right to rest on the presumption that the dock was maintained in such a way that it could be traversed without imperiling life or limb. It seems to us that the honorable trial court committed error in dismissing the action, and the judgment will, therefore, be reversed, with instructions to grant a new trial.

FULLERTON, C. J., and ANDERS, MOUNT, and HADLEY, JJ., concur.

[No. 4988. Decided December 20, 1904.]

COMMERCIAL INVESTMENT COMPANY, *Appellant*, v. THE
NATIONAL BANK OF COMMERCE OF TACOMA,
Respondent.¹

COVENANTS—BREACH—DAMAGES—ASSUMPTION OF MORTGAGE—FAILURE TO PAY—MEASURE OF DAMAGES—PARTIAL RESCISSION. Where, upon the settlement of various differences and indebtedness, the plaintiff conveyed certain lands to the defendant, subject to mortgages, under an agreement that the defendant should pay off all the mortgage indebtedness and save the plaintiff from costs or suits thereon, a breach of defendant's covenant in failing to pay one certain mortgage whereby plaintiff was subjected to a suit thereon, does not entitle the plaintiff, after full performance, to rescind the contract in part, and recover as damages the whole consideration for such broken covenant, since the contract is an entirety and must be rescinded as a whole, if at all, and the remedy is found in an action for the actual damages sustained.

SAME—COMPLAINT—SUFFICIENCY. In such a case, where the complaint alleges that the plaintiff elects to recover damages rather than have a rescission of the contract, and claims damages in the sum of \$45,595.78 as the difference between the value of the property and the amount received for it, and it further appears by the pleadings that the mortgage, which went to foreclosure in violation of defendant's covenant to save plaintiff from suit thereon, was finally paid by the defendant and the judgment satisfied, and plaintiff's complaint alleges no special damages on account of such mortgage or suit thereon, it was not error, on defendant's motion for judgment on the pleadings, to hold that no cause of action was stated in the complaint on which substantial damages could be recovered, as the plaintiff was entitled only to nominal damages under the facts shown.

APPEAL AND ERROR—REVIEW—NOMINAL DAMAGES—CONTROVERSY OVER COSTS. The appellate court will not reverse a judgment for error in refusing to give nominal damages, since an appeal will not be entertained for the purpose of determining who is entitled to costs.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered March 19, 1903, upon

¹Reported in 78 Pac. 910.

granting defendant's motion for judgment on the pleadings, in an action for damages for breach of a covenant to assume mortgages, and save the plaintiff from suits thereon. Affirmed.

T. O. Abbott, for appellant.

Bogle & Richardson and *Bates & Murray*, for respondent.

FULLERTON, C. J.—In this action the appellant sought to recover from the respondent \$43,595.78, as damages for a breach of a contract. In its complaint the appellant alleged, in substance, that, for some years prior to the 10th day of September, 1892, it had extensive business dealings with respondent, during the course of which it became indebted to the respondent in the sum of \$10,666.66 on its own account, the sum of \$6,519.94 on account of notes discounted by the respondent which had not been paid by the makers thereof, and the further sum of \$10,570.98 on account of notes upon which it was an accommodation endorser; that it owned at such time a large amount of real property of the then value of \$101,250, but upon which there were sundry mortgages which, taken together, and with the indebtedness above mentioned, aggregated the sum of \$43,988.22; that on the date above named the appellant and respondent, at the request of the respondent, mutually agreed to settle up and discontinue their business relations; that, during the course of such settlement, differences arose between them as to such settlement, and the respondent threatened the appellant with suit; that it was also threatened with suit by certain of the mortgagees holding mortgages upon its real property; and that, "for the purpose of arriving at a compromise and settlement of all the liabilities of plaintiff to defendant, and of all

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matters of difference and dispute between them of whatsoever nature, express or implied, and also of the said mortgage liens upon said premises, with the express object and purpose of avoiding any suits, or other proceedings at law," it entered into an agreement of settlement with the respondent, being partly in writing and in part oral, the terms of which were, in substance, these: The appellant agreed to pay to the respondent, on accounts other than those above mentioned, the sum of \$16,320.64, and, in satisfaction of the above mentioned accounts, agreed to deed to the respondent the real property above referred to. In consideration for which the respondent agreed, (1) to cancel all of the obligations of the appellant to the respondent; (2) return to the appellant the collateral held by it as security for such indebtedness; (3) accept the deed to the real property mentioned; (4) assume and pay all of the mortgages thereon; (5) not sue appellant on any of such indebtedness; (6) that it would not permit appellant to be sued on account of any of the mortgages then upon the real property, but would pay the same according to the terms thereof, and save the respondent harmless from all interest, costs, and expenses thereof; and (7) that it would grant to the appellant one year in which to repurchase the real property or any part thereof.

It alleged that the conditions of the agreement which were to be performed on the part of the appellant, as well as those numbered 1, 2, 3, and 5, on the part of the respondent, were oral; that those numbered 4 and 7 were in writing, while that numbered 6 was partly in writing and partly oral. It alleged, also, that the appellant performed all of the agreements on its part to be kept and performed; that the respondent failed to keep its part of the agreement in that it refused to pay a cer-

tain mortgage for \$2,300, made to the Mason Mortgage Loan Company, by the appellant, on lands included within the deed; and caused and induced the owner and holder of the same to institute proceedings against the appellant for the foreclosure thereof; that, in pursuance of the respondent's request, the holder of the note and mortgage did begin such an action, in which the respondent appeared and filed an answer denying any liability on its part to pay the note and mortgage, and alleging that the deed above mentioned was never delivered to it, or accepted by it, nor by any person lawfully authorized to act for it in that behalf; that the appellant was compelled to and did appear in the action and enforce against the respondent the agreement above mentioned, so successfully, in fact, that judgment was rendered against the respondent, as the principal debtor, for the amount due upon the note and mortgage; that the appellant appealed to the supreme court from such judgment, that the same was there affirmed, with increased costs against the respondent, and that the respondent had never paid any part of such judgment, nor the costs, nor any part of any of such sums.

It was further alleged that the respondent entered into a conspiracy with one Deming and others, for the purpose of avoiding the payment of the judgment, and that, to harass and embarrass the respondent, and thereby make it pay the judgment, it instituted a suit for the purpose of securing a rescission of the sale of the note and mortgage from Deming, who formerly owned it, to Wheeler, who was plaintiff in the action in which the judgment was recovered, making the appellant a party defendant therein, compelling it to appear and procure a dismissal of the action as to itself.

It is further alleged that, by reason of these acts, the respondent has refused to carry out the contract, and has destroyed and rendered nugatory the object and purpose of the agreement, and the benefits therefrom which would otherwise have accrued to the appellant; that the premises conveyed have greatly depreciated, and are of small value, and that the appellant has elected to recover damages from the defendant rather than have a rescission of the contract. It then alleges that the difference in value of the property at the time of the conveyance and the amount it received for it was \$45,595.78, and demands judgment for that sum, with interest at the legal rate from the 10th day of September, 1892, the date of the deed above mentioned.

On the motion of the respondent, the court struck a portion of the allegations of the complaint, whereupon the respondent, after the appellant had refused to amend, answered as to the remainder. It admitted that it had contested the payment of the note and mortgage mentioned in the complaint on the theory that it was not obligated to pay the same, but averred that judgment had been given against it in spite of such contest; and further pleaded with reference thereto that the judgment had been fully paid by it before the commencement of the pending action, in part by a seizure, and appropriation to satisfaction of the judgment, of its money by the sheriff who had a writ of execution in his hands for the collection of the judgment, and by a voluntary payment on its part of the balance.

The reply of the appellant admitted the seizure by the sheriff of the money of the plaintiff in satisfaction of the mortgage judgment, and its final application to the satisfaction thereof, but reiterated its statement to the effect that a contest was instituted by the respondent

through Deming, and prosecuted by it until February, 1902, when it was finally dismissed on the application of the appellant, and that the money in the hand of the sheriff was not actually applied on the judgment until that date. On the filing of the reply, the respondent moved for a judgment in its favor on the pleadings, which motion the court granted, dismissing the appellant's action, and entering a judgment for costs in favor of the respondent.

From the foregoing statement it will be observed that the complaint was drawn on the theory that, because the respondent failed to keep that part of its agreement wherein it covenanted that it would not sue or permit the appellant to be sued on any of the indebtedness mentioned in the contract, the appellant had the right to rescind the contract in part, and recover as damages the consideration given for the violated portion of the agreement, regardless of the question of the amount of damages it had suffered because of the breach, or whether it has suffered damages on account thereof at all.

But we think the appellant has mistaken its remedy. When a contract is divisible into separate or distinct parts, equity sometimes permits the injured party to rescind, on equitable terms, one such part, while adhering to another independent part; but where the contract is an entirety, or where there is but one entire consideration for a number of conditions, the contract must generally be rescinded as a whole, if rescinded at all. There can be no partial rescission and a refunding of a portion of the consideration, unless it be in an extreme case where there is no possible remedy other than through such a proceeding. The conditions shown in the complaint before us do not call for any such extreme remedy. For the breach of the condition complained of here, the

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remedy is found in an action to recover the actual damages suffered because of such breach of the condition. These ordinarily would be the expenses incurred in compelling the respondent to perform its covenants, and the losses it suffered because of the failure on the part of the respondent to save it from being sued, but it could not be that part of the whole consideration which the appellant claims to have paid to obtain this particular covenant. The consideration paid is rarely, if ever, the measure of damages for the breach of a covenant. The fundamental idea of damages, in all such cases, is compensation for the injury suffered, and, be this greater or less than the consideration paid to secure the covenant, it is the amount, and the only amount, that can be recovered because of a breach thereof. As the complaint shows no special damages, the court did not err in holding that no cause of action was stated on which substantial damages could be recovered.

[It is said, however, that the complaint contains averments sufficient to show a right to nominal damages, and that the judgment must be reversed because the trial court did not permit a recovery for nominal damages. But we have held that this court will not, where the sole object of the action is the recovery of damages, reverse a judgment because the court erroneously failed to direct judgment for nominal damages. *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729. Whether the plaintiff does, or does not, recover, affects only the question of costs, and the appellate court will not entertain an appeal for the sole purpose of determining who is entitled to costs in the court below. The judgment is affirmed.]

MOUNT, DUNBAR, ANDERS, and HADLEY, JJ., concur.

[No. 5059. Decided December 20, 1904.]

THE STATE OF WASHINGTON, *Respondent*, v. CAD
JOHNSON, *Appellant*.¹

CRIMINAL LAW—LARCENY—EVIDENCE—UNIDENTIFIED MONEY—CORROBORATING CIRCUMSTANCE. In a prosecution for the larceny of a twenty dollar gold piece, which the prosecuting witness testified positively was taken from his pocket by the defendant in a certain room, where the defendant was at once arrested and denied the possession of the money, or that it was in the room, a twenty dollar gold piece found secreted in the room within half an hour after the arrest is admissible as a circumstance corroborating the witness, although he was unable to identify it.

CRIMINAL LAW—INFORMATION—VARIANCE—IDEM SONANS. It is not a fatal variance between an indictment and the proof upon a prosecution for larceny from the person of one Shuter, that the name was misspelled in the indictment with a double "t," since they are *idem sonans*.

LARCENY—EVIDENCE—SUFFICIENCY. When the larceny of a twenty dollar gold piece was actually seen, and is testified to positively, there is sufficient evidence to warrant a conviction, the credibility of the witness being entirely for the jury.

Appeal from a judgment of the superior court for King county, Bell, J., entered July 11, 1903, upon a trial and conviction of the crime of larceny. Affirmed.

Morris, Southard & Shipley, for appellant.

W. T. Scott and Elmer E. Todd, for respondent.

MOUNT, J.—Appellant was convicted of the crime of larceny from the person of one Henry Shuter. It is claimed by appellant that the trial court erred in admitting evidence of the finding of a twenty-dollar gold piece in the room in which the larceny is alleged to have occurred. The prosecuting witness testified, in substance, that he was with the appellant on the evening

¹Reported in 78 Pac. 903.

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of February 16, 1903, in room No. 8 of what is known as the Diamond House in Seattle; that the appellant, while sitting on his knee, put her hand into his pocket and took a twenty-dollar gold piece therefrom; that he discovered her hand in his pocket and saw the money in her hand; that he thereupon demanded that she return it to him, which she refused to do; that he immediately sent for a policeman, who arrested the appellant and took both the witness and the appellant to the city jail; that appellant, at the time of the arrest, stated to the policeman that she had not taken the twenty dollars, and that she did not have any money, and that there was none in the room. Within about half an hour after the arrest, the policeman and the witness returned to the room, and, upon a search, found a twenty-dollar gold piece secreted on the dresser under a dresser cloth. The witness could not identify this particular piece of money as his own. The gold piece was offered in evidence and received over the objection of the appellant.

This evidence relating to the gold piece was a circumstance which tended to corroborate the witness, and which the jury had a right to consider, along with the other evidence in the case. The weight to be given this circumstance was solely for the jury. The court did not err, we think, in admitting it, or in refusing, upon motion, to strike it out.

Counsel for appellant again argue that there was a fatal variance between the indictment and the proof. There is no merit in this contention. The indictment alleges that "defendant wilfully, unlawfully, and feloniously the personal property of one Henry Shutter . . . did take, steal, and carry away," while the proof shows that she took the property of Henry Shuter. It will be noticed that the name in the indictment is spelled with

a double "t," while the prosecuting witness said that he spelled his name with but one "t." The rule, as stated in 1 Bishop's New Criminal Proc., at § 688, is as follows:

"The law not regarding orthography, no harm comes from misspelling a name, provided it is *idem sonans* with the true spelling. In reason, on a question not much discussed in the books, the court or jury should determine the pronunciation of the misspelled word in the light of the rule that of two or more not unreasonable interpretations of an indictment, the one shall be adopted which sustains the proceeding; so that if the misspelled name can fairly be pronounced substantially the same as is the true one, there is no variance. Or, as expressed by Stone, J., 'If the names may be sounded alike without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial.'"

Under this rule the variance in this case was immaterial.

Appellant also contends that the evidence is not sufficient to sustain the verdict. From what we have stated of the testimony of the complaining witness, it is readily seen that there was sufficient evidence to go to the jury, provided the witness was worthy of belief. This was a question entirely for the jury. After carefully reading all the evidence in the case, we are not disposed to disturb the verdict.

There is no error in the record, and the judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

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Syllabus.

[No. 4893. Decided December 20, 1904.]

THE STATE OF WASHINGTON, *Respondent*, v. ROMAINE L.
BOGARDUS, *Appellant*.¹

CRIMINAL LAW—INFORMATION—CERTAINTY—BILL OF PARTICULARS. There is no provision in our criminal procedure for attacking an information for lack of certainty by motion to make more definite and certain, or by demand for a bill of particulars, but the remedy is by demurrer.

CRIMINAL LAW — EMBEZZLEMENT — INFORMATION—SUFFICIENCY. An information for embezzlement by the secretary of a society is not demurrable for want of sufficient facts or lack of certainty when it charges that, on a certain day, the defendant was agent of the society and was intrusted by the society with certain moneys belonging to the society, and converted the same to his own use; and it was not necessary to make it more certain by stating the acts constituting the conversion, showing the particular transaction relied upon.

SAME—BILL OF PARTICULARS—DISCRETION. In such a case, it is not an abuse of discretion to refuse to require the state to furnish a bill of particulars, and such refusal can be reversed only for abuse of discretion.

CRIMINAL LAW — EMBEZZLEMENT — EVIDENCE — SUFFICIENCY — VARIANCE. Under an indictment charging the secretary of a society with the embezzlement of \$1,000 intrusted to him by the society on October 3, 1902, there is sufficient proof of the crime charged where it appears that, prior to that time, the defendant was short in his accounts in excess of said sum, having failed to credit \$2,000 previously paid by one W for stock, that on said date, said W having withdrawn on orders \$1,000, the previous receipt for \$2,000 to him was taken up and a new one issued for \$1,000 of the society's stock, and that no record of any kind was made of these transactions, and no notice given to the officers; since the deposit of such stock with the society without crediting it to the account of W and defendant's use of it to reduce his own indebtedness to the society, was an embezzlement by the defendant, under Bal. Code § 7119, fixing the crime upon any agent who "shall convert to his own use or shall fail to account" for any property intrusted to him (Fullerton, C. J., and Anders, J., dissenting).

¹Reported in 78 Pac. 942.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered February 23, 1904, upon a trial and conviction of the crime of embezzlement. Affirmed.

Townsend & Moore and Henley, Kellam & Lindsley (O. C. Moore, of counsel), for appellant. The information was insufficient, stating only conclusions without any of the acts or facts to constitute the offense. *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571; *United States v. Carll*, 105 U. S. 611; *United States v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512; *Batchelor v. United States*, 156 U. S. 426, 15 Sup. Ct. 446; *Cochran v. People*, 175 Ill. 28, 51 N. E. 845; *State v. Farrington*, 59 Minn. 147, 60 N. W. 1088, 28 L. R. A. 395; *State v. Howard*, 66 Minn. 309, 68 N. W. 1096, 61 Am. St. 403, 34 L. R. A. 181; *State v. Carey*, 4 Wash. 430, 30 Pac. 729; *United States v. Simmons*, 96 U. S. 360; *State v. Krug*, 12 Wash. 288, 41 Pac. 126; *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542; *People v. Ward*, 110 Cal. 369, 42 Pac. 894. The court erred in the admission of evidence respecting distinct and separate transactions having no relation to the crime charged. *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523; *Berghoff v. State*, 25 Neb. 213, 41 N. W. 136; *Cowan v. State*, 22 Neb. 519, 35 N. W. 406; *People v. Hill* (Cal.), 34 Pac. 854; *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042. It was error to receive evidence of confessions without proof of the *corpus delicti*. 15 Ency. Plead. & Prac., 380; 6 Am. & Eng. Ency. Law, 569 (2d ed.); *United States v. Mayfield*, 59 Fed. 119; *People v. Hall*, 48 Mich. 482, 12 N. W. 665; 42 Am. Rep. 477; *People v. Whiteman*, 114 Cal. 338, 46 Pac. 99; *People v. Ward*, 134 Cal. 301, 66 Pac. 374. To

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Citations of Counsel.

constitute embezzlement the owner must be deprived of his property by an adverse holding or use, and an acquittal should accordingly have been directed. 2 Bishop New Crim. Law, §§ 372, 373, 379; 10 Am. & Eng. Ency. Law, 904 (2d ed.); *Commonwealth v. Este*, 140 Mass. 279, 2 N. E. 769; *State v. Cunningham*, 154 Mo. 161, 55 S. W. 282; *Spaulding v. Petin* (Ill.), 49 N. E. 998; *Chaplin v. Lee*, 18 Neb. 440, 25 N. W. 609; *McAleer v. State*, 46 Neb. 116, 64 N. W. 358; *State v. Hill*, 47 Neb. 456, 66 N. W. 541.

Horace Kimball and *R. M. Barnhart*, for respondent, contended among other things, that the information was sufficiently definite without alleging the circumstances. *State v. King*, 81 Iowa 587, 47 N. W. 775; *People v. Gordon*, 133 Cal. 338, 65 Pac. 746; Bishop, Statutory Crimes, § 422 (3d ed.); *State v. Broughton*, 71 Miss. 90, 13 South. 885; *State v. Crosswhite*, 130 Mo. 358, 32 S. W. 991, 51 Am. St. 571; *State v. Mathis*, 106 La. 263, 30 South. 834; *People v. Cobler*, 108 Cal. 538, 41 Pac. 401; *Keys v. State*, 112 Ga. 392, 37 S. E. 762, 81 Am. St. 63; *State v. Turner*, 10 Wash. 94, 38 Pac. 864; *Malcolmson v. State*, 25 Tex. App. 267, 8 S. W. 468. It is sufficient to allege the offense in the language of the statute. *People v. Taylor*, 96 Mich. 576, 56 N. W. 27, 21 L. R. A. 287; *United States v. Pond*, 2 Curtis 265; *United States v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512; *United States v. Harper*, 33 Fed. 471; *State v. Turner*, 10 Wash. 94, 38 Pac. 864; *State v. Lewis*, 31 Wash. 515, 72 Pac. 121; *State v. Lewis*, 31 Wash. 75, 71 Pac. 778; *State v. Hoshor*, 26 Wash. 643, 67 Pac. 386; *People v. Hill*, 3 Utah 334, 3 Pac. 75; *State v. Whiteman*, 9 Wash. 402, 37 Pac. 659. The evidence of later acts respecting defendant's method of keeping his accounts was admis-

sible to show his intent. *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042; *People v. Gray*, 66 Cal. 271, 5 Pac. 240; *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389; *Commonwealth v. Tuckerman*, 10 Gray 173; *People v. Neyce*, 86 Cal. 393, 24 Pac. 1091; *Territory v. Meyer* (Ariz.), 24 Pac. 183; *People v. Bidleman*, 104 Cal. 608, 38 Pac. 502; *People v. Ward*, 134 Cal. 301, 66 Pac. 372; *State v. Coss*, 12 Wash. 673, 42 Pac. 127; *State v. Newton*, 29 Wash. 373, 70 Pac. 31; *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357. The confessions were competent, with slight corroboration, to prove the *corpus delicti*. *People v. Badgley*, 16 Wend. 53; *Sullivan v. State*, 58 Neb. 796, 79 N. W. 721; *Hopt v. People*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; *Flower v. United States*, 116 Fed. 241; *State v. Keller* (Idaho), 70 Pac. 1051; *State v. Hall*, 31 W. Va. 505, 7 S. E. 422; *People v. Jaehne*, 103 N. Y. 182, 8 N. E. 374; *People v. Elliott*, 106 N. Y. 288, 12 N. E. 602; *United States v. Bassett*, 5 Utah 131, 13 Pac. 237; *Roberts v. People*, 11 Colo. 213, 17 Pac. 637; *People v. Harris*, 114 Cal. 575, 46 Pac. 602; *People v. Tarbox*, 115 Cal. 57, 46 Pac. 896; *State v. Fitzgerald*, 63 Iowa 268, 19 N. W. 202; *Floyd v. State*, 82 Ala. 16, 2 South. 683; *Lambright v. State*, 34 Fla. 564, 16 South. 582; *Jackson v. State* (Texas), 16 S. W. 247; *Holland v. State*, 39 Fla. 178, 22 South. 298; *State v. Guild*, 5 Halsted 163 (N. J. L.), 18 Am. Dec. 404; *State v. Hodskins*, 19 Me. 155, 36 Am. Dec. 742. And the confession may be admitted before the other evidence is offered. *People v. Jones*, 123 Cal. 65, 55 Pac. 698; *People v. Whiteman*, 114 Cal. 338, 46 Pac. 99; *People v. Ward*, 134 Cal. 301, 66 Pac. 372. If there was error in this order of proof, it was cured by the subsequent reception of corroborative proof. *Floyd v. State* and *Hol-*

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land v. State, supra; Anthony v. State, 44 Fla. 1, 32 South. 818.

MOUNT, J.—The appellant was convicted of the crime of embezzlement, and, from the judgment and sentence pronounced against him, he appeals.

The record discloses that the appellant was, from the year 1898 till the end of the year 1902, the secretary of the Spokane Building & Loan Society. As such secretary it was a part of his duties to take a receipt for all moneys received, belonging to the society, record the amount in its books, showing when and from whom received, and deposit the same in the authorized depository of the society, notifying its treasurer of such deposit by sending him a duplicate of the deposit ticket received at the time of making the deposit. It was further his duty to make, to the trustees of the society, periodical reports of the business done by the society, showing, among other things, the total amount of money received, the amount disbursed, and the cash balance on hand belonging to the society. The appellant also acted as secretary of the board of trustees. All claims against the society, all applications for loans, and, in fact, all the business of the society calling for the action of the trustees, reached them through his hands. The treasurer of the society kept only a cash account. He charged himself with the amount of money deposited to his credit, and credited himself with the checks for payment of moneys which he was required to countersign. His books, however, showed nothing more than mere cash balances. They did not show from whom the money was received, nor to whom payments were made. In a word, it was made the duty of the secretary to keep accounts showing all of the business transactions of the society, and, if his books were honestly kept,

they would show at all times the exact condition of the society's affairs.

Shortly after he entered upon his duties as secretary, the appellant began to appropriate to his own use the money of the society. These peculations he was able to conceal from the officers of the society and the accountants who examined his accounts at the end of each year, by the process of withholding from entry on the books enough of his collections, made on behalf of the corporation, to keep a balance between his books and his cash on hand. The amount so taken up to June 30, 1903, was something over \$2,500. Some time prior to the last named date, the society called in its eight per cent interest bearing stock to an equal amount. One H. M. Whitehouse held stock of the character called in, and, pursuant to the notice sent him, called at the office of the company to make the exchange. His stock amounted to \$2,046.67, and, on his surrendering his certificates, a check on the company fund for this amount was given him. On its receipt he immediately indorsed it back to the company, at the same time making an application for \$2,000 in other stock, taking the difference between the amount of his application and the amount of the check, in cash. A receipt was then given him by the secretary, showing he had on deposit with the society the sum of \$2,000. No record of any kind was made on the books of the company showing this transaction with Whitehouse, and the application itself was kept concealed from the other officers of the company. The check, however, having been previously countersigned by the treasurer, was passed by the secretary through the depository bank, and a counterbalancing deposit ticket for a like amount placed to the credit of the society.

When the check was indorsed to the society by Whitehouse, he informed the secretary that he desired to use a

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part, at least, if not the whole, of the sum so deposited, in other channels, and, between that date and October 3 following, withdrew, on orders in cash, amounts aggregating \$1,000, all of which, with the possible exception of an order for \$350, was taken from the society's funds. At the last named date, the receipt for \$2,000 was taken up, and a new one issued for \$1,000 of the society's stock. At about this time, the president of the society, without notice to the secretary, put an accountant on the books, who, within a short time thereafter, discovered certain defalcations. It was discovered, also, that the secretary, in his endeavor to cover up the defalcations, after the accountant had begun his work, had misapplied other funds of the society; that is, he had collected outside accounts, and put the money to the credit of the society without making the corresponding entry showing the collections, and he also withheld from payment an order for \$2,046.67, drawn on the treasurer, that his credit with the society might appear to be larger by that amount.

The information upon which the appellant was tried was as follows:

"That the said defendant, Romaine L. Bogardus, on the 3d day of October, 1902, in the county of Spokane and state of Washington, then and there being the agent of the Spokane Building & Loan Society, a corporation, said Spokane Building & Loan Society then and there being a corporation, was then and there by virtue of being such agent of the said corporation intrusted by said corporation with the sum of one thousand (\$1,000) dollars in bank notes, money and currency of the United States of the value of one thousand (\$1,000) dollars, the same then and there being the money and property of said corporation, and that the said defendant did then and there by virtue and on account of being such agent of said corporation, as aforesaid, and by virtue and on account of being intrusted with the said money by said corporation,

as aforesaid, receive and take into his, the said defendant's, possession the money and property aforesaid, which he, the said defendant, then and there held for and in the name and on account of said corporation, and that he, the said defendant, did then and there wilfully, unlawfully, feloniously and fraudulently convert to his, the said defendant's, own use said property and money so intrusted to said defendant, as aforesaid."

On being required to plead, the appellant moved that the state be required to make the information more definite and certain, by stating the acts constituting the transaction by which the appellant converted the money of the society to his own use, as alleged in the information, so that the appellant might be apprised of the particular transaction relied upon. On this motion being overruled, he demanded a bill of particulars, which being denied, he demurred to the information on several grounds, among which was the ground that it did not apprise the appellant of the nature and cause of the accusation against him. This demurrer was also overruled, whereupon he pleaded not guilty. At the opening of the trial, the prosecution elected to base its claim for a conviction upon the transaction with Mr. Whitehouse above set out, and it was upon that transaction he was tried and convicted.

The appellant first assigned that the court erred in overruling his motion to make the information more definite and certain, in refusing to direct that a bill of particulars be furnished, and in overruling the demurrer to the information. With reference to the motion to make more definite and certain, it can be said that it is not technically a recognized mode of attacking an information or indictment in this state. The statute, it is true, prescribes certain requisites for an information or indictment, among which is that it must be direct and certain as regards the

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crime charged and the particular circumstances of the crime charged, when they are necessary to constitute a complete crime, and, also, that the act or omission charged as the crime must be stated in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. Yet the only method pointed out by statute for attacking the indictment or information, where it fails in these particulars, is by demurrer. But, treating the motion as a demurrer and considering it in connection with the demurrer actually filed, we do not think the question raised thereby is well taken. The information charges, that the appellant on a day certain was the agent of the society named; that he received on that day moneys belonging to his principal by reason of his trust, to the amount of \$1,000; that he fraudulently and feloniously converted the same to his own use. These acts constitute all the elements of the crime of embezzlement prescribed by the statute, and we think the information is clearly sufficient. *State v. Turner*, 10 Wash. 94, 38 Pac. 864; *State v. Hoshor*, 26 Wash. 643, 67 Pac. 386; *State v. Lewis*, 31 Wash. 75, 71 Pac. 778.

The application for a bill of particulars is likewise without sanction in the statutes relating to criminal procedure. While statutes governing the civil procedure require that the courts may require a bill of particulars to be furnished in particular cases, yet this practice is not made applicable to criminal procedure, and, if the power rests in the courts at all when exercising jurisdiction in criminal cases, it must be found among its inherent powers. But whether or not the power does rest within the court, it is not necessary here to determine; for, conceding that it does, it is a discretionary power, and the refusal of the court to exercise it can be reviewed only

for abuse of discretion, and we find no such abuse in the present record.

The next objection is that the evidence was insufficient to sustain the verdict of the jury. As we have said, the state based its right to a conviction upon the transaction had with Mr. Whitehouse. The evidence shows conclusively that, at the time of this transaction, the appellant was short in his accounts with the society some \$2,500. This money had been converted by appellant to his own use prior to that time. When appellant issued and delivered the check of the association for \$2,046.67 to Mr. Whitehouse, it was indorsed by Mr. Whitehouse and returned to appellant, who paid Whitehouse \$46.67 in cash, leaving \$2,000 to the credit of Whitehouse with the society. No record of any kind was made of this transaction upon the books of the building and loan society. By this transaction the shortage of the appellant was diminished and concealed by the amount of the deposit. Appellant subsequently, and before any shortage was discovered, paid upon orders of Whitehouse \$1,000, still leaving \$1,000 due Whitehouse from the society. Thereafter, when a shortage was discovered and appellant was confronted therewith by the board of directors, he then, for the first time, acknowledged this transaction. We think these facts made out a clear case of embezzlement under our statute, which provides that:

"If any agent, clerk, officer, servant, or person to whom any money or other property shall be intrusted, with or without hire, shall fraudulently convert to his own use, or shall take and secrete the same with intent fraudulently to convert the same to his own use, or shall fail to account to the person so intrusting it to him, he shall be guilty of larceny . . ." Bal. Code, § 7119.

When appellant received the check for \$2,046.67, and deposited it to the credit of the society for the purpose of

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covering up his own shortage, already existing to that amount, he thereby converted it to his own use. The fact that he made no entry upon the books of the society of the amount received was evidence of a fraudulent intention. *State v. Baumhager*, 28 Minn. 227, 9 N. W. 704; *State v. Trolson*, 21 Nev. 419, 32 Pac. 930; *Bowman v. Brown*, 52 Iowa 437, 440, 3 N. W. 609; *Spalding v. People*, 172 Ill. 40, 49 N. E. 993; *American Bonding etc. Co. v. Milwaukee etc. Co.*, 91 Md. 733, 48 Atl. 72.

Suppose that appellant had taken this check for \$2,046.67, or any part of it, and paid it to some third party without the knowledge and consent of the society, in liquidation of a personal debt owing by appellant to such third party; such misappropriation of the fund would amount to embezzlement, because the payment of the fund upon his private account would be a fraudulent conversion of such fund to his own use. The fact that appellant paid the money to the society for his own use, in such a way as to liquidate a debt really owing but unknown to the society, is not capable of reasonable distinction from the supposed case. It is true, the check, or money which it represented, was intrusted by Whitehouse to appellant, to be placed with the funds of the society as a credit to Whitehouse. The society thereby became immediately liable to Whitehouse for that amount, and it is also true that the identical check intrusted was deposited with the society; but, instead of being deposited in the ordinary way, it was diverted to an unlawful use—the use of the appellant. If money is handed to the cashier of a bank to be placed on deposit in such bank to the credit of the depositor, and the cashier uses such money to pay his own obligation to the bank, without the knowledge of the depositor or the bank, he is certainly guilty of embezzlement under the statute. This

is, in fact, what appellant did. We think the evidence was clearly sufficient to sustain the verdict.

There is no error in the record. The judgment is affirmed.

HADLEY, and DUNBAR, JJ., concur.

FULLERTON, C. J. (dissenting).—The appellant was charged with embezzling a certain fund. The proof is that he made a false entry in his books concerning this fund to cover up a previous embezzlement. I do not think this sufficient proof of the crime charged. The judgment should be reversed.

ANDERS, J., concurs with FULLERTON, C. J.

[No. 4971. Decided December 20, 1904.]

*In the Matter of the Petition of RONALD AUBREY for a Writ of Habeas Corpus.*¹

CONSTITUTIONAL LAW—LIBERTY OF CONTRACT—POLICE POWERS—LICENSING OF BLACKSMITHS. Laws 1901, p. 118, requiring horse-shoers to pass an examination and pay a license fee and providing a penalty for practicing their trade without a license, is not a valid exercise of the police power, but is unconstitutional, as an arbitrary interference with personal liberty and private property without due process of law.

Application to the supreme court for a writ of habeas corpus, filed December 16, 1903. Writ granted.

H. F. Norris and *Vance & Mitchell* for petitioner, to the point that the act was an arbitrary interference with the liberty of the citizen, cited: *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; *Norris v. Waco*, 57 Tex. 635; *Harrodsburg v. Renfro* (Ky.), 58 S. W. 795, 51 L. R. A. 897; *Chaddock v. Day*, 75 Mich. 527,

¹Reported in 78 Pac. 900.

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37	103
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36	308
42	241

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Citations of Counsel.

42 N. W. 977, 13 Am. St. 468, 4 L. R. A. 809; *Ex parte Frank*, 52 Cal. 606; *Sayre Borough v. Phillips*, 148 Pa. St. 482, 24 Atl. 76, 33 Am. St. 842, 16 L. R. A. 49; *In re Haskell*, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527; *People ex rel. Fleischman v. Caldwell*, 168 N. Y. 671, 61 N. E. 1132; *State ex rel. Winkler v. Benzenberg*, 101 Wis. 177, 76 N. W. 345; *Ex parte Sing Lee*, 96 Cal. 354, 31 Pac. 245, 31 Am. St. 218, 24 L. R. A. 195; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231. It is an unlawful delegation of legislative power. *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064; *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458; *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 37 Am. St. 206, 22 L. R. A. 340; *Harmon v. State*, 66 Ohio St. 249, 64 N. E. 117, 58 L. R. A. 618; *State v. Carey*, 4 Wash. 424, 30 Pac. 729.

Fremont Campbell, *Charles O. Bates* and *Walter M. Harvey*, for respondent. The horseshoers' act is within the police power of the state. *People ex rel. Nechamcus v. Warden of City Prison*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; *Logan v. State*, 5 Tex. App. 306, 22 Am. & Eng. Ency. Law, 931; *State v. Carey*, 4 Wash. 424, 30 Pac. 729. The act does not violate § 12, art. 1, of the constitution, and is not class legislation. *People ex rel. Hobach v. Buttlung*, 35 N. Y. Supp. 19; *Hayes v. Territory*, 2 Wash. Ter. 286, 5 Pac. 927; *Cooley*, Const. Lim. (5th ed.), p. 482; *Fitch v. Applegate*, 24 Wash. 28, 64 Pac. 147; *Cook v. State*, 90 Tenn. 407, 16 S. W. 471, 13 L. R. A. 183. Nor does it violate the constitution of the United States. *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989. The act is not in conflict with the constitution because certain persons are exempted from the operation of the act. *State ex rel. Smith v.*

Board of Dental Examiners, 31 Wash. 492, 72 Pac. 110. It is not in conflict with the constitution by reason of the fact that it delegates to the mayor of cities the power to appoint a board, who shall determine the qualifications of the applicants for certificates. *People v. Warden of City Prison*, and *Logan v. State*, *supra*.

PER CURIAM.—This is an original application instituted in this court by the petitioner for a writ of habeas corpus. From the record it appears, that the petitioner is a citizen of the state of Washington, residing at the city of Tacoma, therein, where he has resided for fourteen years last past; that during such time he has pursued and practiced the trade and occupation of a blacksmith and horseshoer, on which trade, solely, he depends for the livelihood, support, and maintenance of himself and his family; that he was arrested at the city of Tacoma on the 17th day of December, 1903, by one Martin Garret, a constable for Tacoma precinct, and imprisoned and detained by him on a criminal warrant issued by one C. E. Griffin, a justice of the peace in and for Tacoma precinct, charging him with having practiced the trade of a master horseshoer, for hire, without complying with the provision of the act of March 11, 1901, relating to master horseshoers. The complaint on which the warrant of arrest was issued is as follows:

"That on or about the 22nd day of August, A. D. 1903, in the county of Pierce, in the state of Washington, the above named defendant, Ronald Aubrey, then and there being, did unlawfully and knowingly violate and neglect to comply with the provisions of the act of the legislature of the state of Washington, entitled 'An act requiring horseshoers in the cities of the first, second and third classes of this State to pass an examination, and providing for a board of examiners in said cities, and

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providing a penalty for the violation of the provisions of this act, and repealing an act entitled "An act requiring horseshoers to pass an examination, and providing for a board of examiners," approved March 13, 1899,' approved March 11, 1901; in this that the said Ronald Aubrey, then and there being, did unlawfully and knowingly practice horseshoeing as a master horseshoer for hire, in the city of Tacoma, said county and state, said city being a city of the first class, and without registering as such in accordance with the provisions of said act, contrary to form of the statute in such cases made and provided, and against the peace and dignity of the state of Washington. Wherefore, said complainant prays that the said defendant may be arrested and dealt with according to law."

The main contention of relator's counsel is that the above enactment, under which petitioner was arrested and held in custody by respondent, is unconstitutional and void, under the provisions of both the state and federal constitutions, in that it deprives relator of his liberty and property without due process of law, and denies to him the equal protection of the laws. The enactment in question is found in the session laws of Washington, 1901, p. 116, chapter 67, and is entitled, "An act requiring horseshoers in cities of the first, second and third classes in this state to pass an examination, and providing for a board of examiners in said cities, and providing a penalty for the violation of the provisions of this act, and repealing an act entitled 'An act requiring horseshoers to pass an examination, and providing for a board of examiners,' approved March 13, 1899."

Sections 1 and 2 of this act provide for the registration of master and journeyman horseshoers in cities of the classes above named. Section 3 provides for the issuance of certificates to such horseshoers. Section 4 provides that,

"In every city affected by this act, there shall be appointed a board of examiners consisting of one veterinary and two master horseshoers and two journeyman horseshoers which shall be called 'horseshoers board of examiners,' who shall be residents of such city, and whose duty it shall be to carry out the provisions of this act, and shall have a power to fix a standard of examinations to test the qualifications of applicants. The members of said board shall be appointed by the mayor of such city, and the term of office shall be five (5) years, except that the members of said board first appointed shall hold office for the term of one, two, three, four and five years, as designated by the mayor and until their successors shall be duly appointed. The board of examiners shall have a regular place of meeting and shall hold sessions for the purpose of examining applicants desiring to practice horseshoeing as master or journeyman horseshoers in each city affected by this act, not later than three days after applications have been presented to them, and shall grant a certificate to any person showing himself qualified to practice, and the board shall receive as compensation a fee not exceeding ten (\$10) dollars from each person examined. Three members of said board shall constitute a quorum."

Section 5 provides for the payment of a registration fee of fifty cents to the city treasurer of the city in which the applicant may desire to register. Section 6 prescribes penalties for the violation of the provisions of the act. Article 1, section 3, of our state constitution provides that, "No person shall be deprived of life, liberty, or property without due process of law." The fourteenth amendment of the constitution of the United States contains a similar provision, and further prescribes that no state shall deny to any person within its jurisdiction the equal protection of the laws.

The following quotation is taken from the brief of the counsel for petitioner Aubrey.

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"We admit, in the outset, that the state has power to tax all trades and occupations, and that this power is only limited by the constitutional requirement that its exercise shall fall upon all citizens of like class and similar conditions equally. We deny that the legislature can license, for purposes purely of regulation and restraint or prohibition, any of the usual, ordinary, and harmless occupations of life."

Respondent's counsel argue that the act under consideration should be upheld as a legitimate and proper exercise of the police power of the state, and not upon the theory that this law was enacted for the purposes of raising revenue. They say: "That it is within the police power of the state to regulate such occupations or business enterprises as may, if unrestricted in their exercise, be injurious to the public health, safety, morals or general welfare, even though they may be perfectly lawful."

State v. Carey, 4 Wash. 424, 30 Pac. 729, was a case where the defendant was prosecuted and convicted for practicing medicine without having first obtained a license for such purpose, pursuant to the statutes of this state. Laws 1889-90, p. 114. That enactment was sustained by this court as a proper exercise of the police power inherent in the state. In the opinion of the court in that case, the following language was used:

"The practice of medicine and surgery is a vocation that very nearly concerns the comfort, health and life of every person in the land. Physicians and surgeons have committed to their care the most important interests, and it is an almost imperious necessity that only persons possessing skill and knowledge should be permitted to practice medicine and surgery."

In the case of *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110, we held that the

laws of this state relating to the practice of dentistry (Session Laws 1901, p. 315, amending the dentistry act of 1893) fell within the exercise of the police power of this state, and hence were not unconstitutional on the ground of infringement of individual rights. At page 497 in this volume, it is observed in the opinion of the court that,

"The wisdom of such regulations, pertaining not only to dentistry, but also to the practice of medicine and surgery, is apparent. It is of the highest importance to the state that suffering and afflicted humanity shall not be subjected to the care and treatment of unlearned and unskilled persons. In its effort to prevent such a misfortune to its people, the state may adopt a standard for the test of fitness to engage in the work of what should be a learned profession."

No argument is needed to show that the practice of the above professions is closely related to the health and comfort and welfare of the people. In fact, it is a matter of common knowledge that the practice of medicine and surgery by unskilled parties may seriously affect or endanger the very life of individuals treated or operated upon. The exercise of the police power by the state, within its proper sphere, is well calculated to promote and safeguard the public welfare and subserve the best interests of society. But this power, however comprehensive it may be under our fundamental law, has its limitations. In *In re Jacobs*, 98 N. Y. 108, 110, Earl, J., says:

"The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. . . . Generally it is for the legislature to determine what laws and regulations are needed to protect the public health

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and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded."

Again, in *Slaughter-House Cases*, 16 Wall. 36, 87, Mr. Justice Field observes:

"All sorts of restrictions and burdens are imposed under it [the police power], and when these are not in conflict with any constitutional prohibitions, or fundamental principles, they cannot be successfully assailed in a judicial tribunal. . . . But under the pretense of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen, which the constitution intended to secure against abridgement."

It may be stated, as a general principle of law, that it is the province of the legislature to determine whether the conditions exist which warrant the exercise of this power; but the question, what are the subjects of its exercise, is clearly a judicial question. One may be deprived of his liberty, and his constitutional rights thereto may be violated, without the actual imprisonment or restraint of his person. "Liberty" in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work when he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights—which limit him in his choice of a trade or profession—are infringements upon his fundamental rights of liberty, which are under constitutional protection.

In *People ex rel. Nechamcus v. Warden of City Prison*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718, the court held, that Chap. 602, Laws of 1892 of the state of New York, which provided for the creation of a board for the examination of plumbers, and which prohibited any person to exercise the calling of a master plumber without passing an examination before such board, was a valid exercise of the police power, for the reason that the work of plumbing is essential to the comfort and health of the inhabitants of cities. This decision was rendered by a divided court. Three members of the above court dissented. Justice Peckham, who afterwards became an associate justice of the supreme court of the United States, delivered a strong dissenting opinion in which the following language occurs:

"The legislature might probably provide for a sanitary inspection of plumbing work, and thus secure a kind of work, as to its system and sufficiency, which might fairly be said to tend towards the protection of the health of the general public. But the trade of the practical plumber is not one of the learned professions, nor does such a tradesman hold himself out in any manner as an expert in the science of 'sanitation,' nor is any such knowledge expected of him, and this act, when practically enforced, may or may not exact it of him."

Assuming, for the purpose of the present controversy, that the propositions announced by the majority of the court in the New York case last cited are good law, still, we think that there is a marked distinction between the business of plumbers and that of horseshoers, in the matter of the pursuit of their respective avocations in cities. The plumber's business may concern and directly affect the health, welfare, and comfort of the inhabitants who have occasion to call such services into action in the community in which he plies his vocation, while the pur-

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suit of the trade of a horseshoer, under ordinary circumstances and normal conditions, would have no such effect.

The supreme court of the United States in *Allgeyer v. Louisiana*, 165 U. S. 589, 17 Sup. Ct. 427, in defining the word "liberty" as the same appears in the fourteenth amendment of the Federal Constitution, uses this language:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from mere physical restraint of his person by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The opinion of the court in that case was delivered by Mr. Justice Peckham, who wrote the dissenting opinion in *People v. Warden of City Prison*, *supra*, as above noted. The only cases directly upon the point are from Illinois and New York, in each of which an enactment similar to the one here in question is held unconstitutional, as being an arbitrary interference with personal liberty and private property of the citizen without due process of law. *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; *People v. Beattie*, 89 N. Y. Supp. 193.

It seems to us that these cases state the correct rule. We conclude, therefore, that the act complained of cannot be sustained as a legitimate exercise of the police power, under the fundamental law of this state, and that the prayer of petitioner must be granted. The petitioner is discharged.

[No. 5025. Decided December 20, 1904.]

SIMON SWENSON *et al.*, Respondents, v. GEORGE A. STOLTZ *et al.*, Appellants.¹

NEGOTIABLE INSTRUMENTS — INDORSEMENT — GUARANTY — ORAL GUARANTY FOR VALUE, NOT AFFECTED BY WANT OF INDORSEMENT. The negotiable instrument law of 1899, p. 347, §§ 30, 31, and 49, providing for negotiation by indorsement, does not affect an oral guaranty made by the payee in transferring a promissory note without indorsing the same since § 49 vests the title in the transferee without indorsement and the guaranty is an original obligation independently of the note, raising no question between the maker and the holder of the note.

NEGOTIABLE INSTRUMENTS — FRAUDS, STATUTE OF — ORAL GUARANTY. The oral guaranty of a promissory note, made by the payee upon negotiating the same for value received, is not within the statute of frauds, and is a binding contract independently of the note.

SAME — STATUTE LIMITING LIABILITY TO PERSONS WHOSE SIGNATURES APPEAR ON INSTRUMENT. Section 18 of the negotiable instrument law (Laws 1899, p. 347) limiting liability to persons whose signatures appear upon the instrument, and intended to operate as a statute of frauds, has no application to oral guaranties made by the payee upon transferring a note for value received, since that is an original and absolute obligation, to which the note is merely incidental and collateral.

COMMUNITY PROPERTY — LIABILITY — JUDGMENT — CONFORMITY TO VERDICT — ORAL GUARANTY OF HUSBAND — VERDICT AGAINST HUSBAND — FAILURE TO FIND LIABILITY OF COMMUNITY. In an action against a husband and wife upon the oral guaranty of the husband, made by him upon transferring a note for value received, in which action recovery is sought against the husband personally and against the property of the community, and the only question submitted to the jury was the personal liability of the husband, upon which they returned a verdict against the husband without passing upon the community liability, it is error to enter judgment upon the verdict against the community composed of the husband and wife, since such judgment does not conform to the verdict, as required by Bal. Code § 5115.

¹Reported in 78 Pac. 999.

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Opinion Per HADLEY, J.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered May 1, 1903, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon an oral guaranty of a promissory note. Modified.

John M. Gleeson, for appellants.

L. J. Birdseye and Harris Baldwin, for respondents.

HADLEY, J.—This action is based upon an alleged oral guaranty of a promissory note. The note contained a promise to pay to the order of George A. Stoltz, for value received, the sum of \$1,500, and was executed by Charles T. Uhlman and Halcyon Uhlman. The complaint alleges, in effect, that, as payment to plaintiffs of \$1,500, for value received, by George A. Stolz, and in consideration thereof, the said Stoltz transferred and delivered said note to the plaintiffs, and orally guaranteed to them that the note was perfectly good, as good as gold, and would be paid by said makers when it became due; that plaintiffs then received and accepted said note and said guaranty from said Stoltz; that at the maturity of the note plaintiffs presented it to the makers and demanded payment, but they failed and refused to pay it; that immediately thereafter they notified said defendant Stoltz of the nonpayment of the note, and demanded of him that he pay the amount thereof; that, thereafter and prior to the commencement of this suit, said demand was repeated, but said Stoltz neglected and failed to pay the amount, or any part thereof. Judgment is demanded for the amount, with interest, less a credit of \$93.60.

The answer denies the material allegations of the complaint. A trial was had before the court and a jury, which resulted in a verdict against the defendant George A. Stoltz for the sum of \$1,695.94. Judgment was

thereafter rendered for the amount against George A. Stoltz, and against the community composed of the defendants George A. Stoltz and Lucy Stoltz, his wife. The defendants have appealed from the judgment.

The main contention of appellants is that the court erred throughout its entire conduct of the case, including the overruling of the demurrer to the complaint, by holding that the facts stated are sufficient to make appellants liable. As far as controverted facts are concerned, they have been settled by the jury in favor of respondents, and against George A. Stoltz. We shall therefore confine ourselves to the matter of their sufficiency to entitle respondents to recover. Appellants insist that, under our statute relating to negotiable instruments, §§ 30 and 31, p. 347, Laws 1899, the title to the note did not pass to respondents, in the absence of the payee's indorsement thereon. Those sections are as follows:

"§ 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

"§ 31. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement."

It will be observed that the two sections, taken together, provide that an instrument, when payable to order, is negotiated by the indorsement of the holder, completed by delivery, and that the indorsement must be written upon the instrument itself, or upon a paper attached thereto. Section 49 of the same act, however, provides as follows:

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"Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

It is thus clear that, while sections 30 and 31 state how the negotiation may be completed, yet section 49 expressly says that mere delivery of an instrument, payable to order, vests title in the transferee and, also, carries with it the right to compel the indorsement of the transferer. In the event of a suit upon the note itself, and against the makers, the necessity for such indorsement might become material in order to maintain the suit, as upon an assigned instrument under the terms of § 4835, Bal. Code. But this is not a suit against the makers of the note.

Appellants next call attention to § 18 of said act of 1899, which is as follows:

"No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed his own name."

It is argued that, under the terms of the above section, considered, also, together with §§ 30 and 31, set out above, there can be no liability here in the absence of appellants' signatures upon the note. It will be observed that § 18 says that no person is liable "on the instrument" whose signature does not appear thereon. This is not a suit on the instrument, but upon the guaranty of appellants that the amount the note represented would be paid when due. The guaranty of a note is

not a promise to answer for the debt of the maker, and is not within the statute of frauds, when it is negotiated in consideration of value received by the guarantor, but it becomes the original and absolute obligation of the guarantor himself whereby he promises to pay his own debt to the guarantee—that is to say the debt he owes his guarantee for what he has received from the latter. The note, meanwhile, is delivered and held as collateral to the promise of the guarantor. If the maker pays it at the date of its maturity, the guarantor's obligation is, by that fact, discharged; but, if the maker fails to pay, the guarantor remains liable upon his own obligation, which is absolute and independent of the note itself. *Cardell v. McNeil*, 21 N. Y. 336; *Milks v. Rich*, 80 N. Y. 269, 36 Am. Rep. 615; *Bruce v. Burr*, 67 N. Y. 237; *Holm v. Jamieson*, 173 Ill. 295, 50 N. E. 702, 45 L. R. A. 846; *Delsman v. Friedlander*, 40 Or. 33, 66 Pac. 297; *Kiernan v. Kratz*, 42 Or. 474, 69 Pac. 1027, 70 Pac. 506. That an oral guaranty, under such conditions, is binding upon the guarantor, is held in the following cases: *Cardell v. McNiel*, *Milks v. Rich*, *Bruce v. Burr*, and *Kiernan v. Kratz*, *supra*; also, in *Union Nat. Bank v. First Nat. Bank*, 45 Ohio St. 236, 13 N. E. 884; *Taylor v. Soper*, 53 Mich. 96, 18 N. W. 570; *Koch v. Melhorn*, 25 Pa. St. 89, 64 Am. Dec. 685. See, also, 2 Daniel, Negotiable Instruments, § 1763 (5th ed.); Tiedeman, Commercial Paper, § 418.

Appellants argue that the so-called negotiable instrument law, which has been recently adopted by a number of the states, including our own, with a view to uniformity of laws upon that subject, was intended as in the nature of a statute of frauds pertaining to the liability of persons in connection with negotiable paper, and that no liability can exist without the signature of

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the person sought to be charged upon the negotiated instrument, under § 18 of our law upon the subject. Such is, no doubt, true where liability is predicated upon the instrument itself, but, as we have seen, this is not such a case. The liability sought to be enforced neither arises out of the instrument, nor is it based thereon. This note, made by third parties, is merely an incidental and collateral matter to the agreement sued upon here, which is, in effect, an agreement to make good to respondents that from which they parted, and which they turned over to the party here sought to be charged.

Appellants admit that the authorities last above cited are in point as supporting liability under a verbal guaranty; but they urge that those cases were decided before the adoption of the negotiable instrument law, by the states where it has since become a law. It is true, most of the decisions are older than the statutes now in force in the states where some of the decisions were rendered. The law is of recent origin, and was not adopted by this state until 1899. The same year, the state of Oregon adopted the law, and since that time, to wit, in 1902, the supreme court of that state, in *Kiernan v. Kratz*, *supra*, held an oral guaranty of a check and certificates of deposit to be enforceable. No reference is made in the opinion to the negotiable instrument law. The case was discussed with reference to the ordinary provisions of the statute of frauds, and was held not to come within those provisions, for the reason that the obligation was the absolute and independent one of the guarantor to answer for his own debt. While the fact that the inception of the obligation in that case antedated the negotiable instrument law may distinguish it from this, still, we think the statute was not intended to change the rule followed by the above cases where the obligation is the

absolute one of the guarantor, and is not a liability on the instrument itself. We therefore think the court did not err in its application of the law upon this subject.

It is assigned that the court erred in entering judgment against the community composed of appellants, on the verdict against George A. Stoltz. The complaint alleges, and the answer denies, that the obligation was for the benefit of the community. That subject was, therefore, in issue. Personal recovery against the husband alone was asked, with the additional demand that it should be enforced against the property of the community. The only question submitted to the jury was that of the personal liability of the husband. We fail to find in the record any request, from either party, that the question of community liability should be submitted to the jury. They, therefore, did not pass upon the subject, and the verdict contains no finding concerning it. Section 5115, Bal. Code, requires as follows:

"When a trial by jury has been had, judgment shall be entered in conformity to the verdict . . ."

We cannot say that this judgment is in conformity to the verdict, except as to the personal liability of the husband. Respondents urge that *McDonough v. Craig*, 10 Wash. 239, 38 Pac. 1034, is authority for entering the judgment. There the personal liability was found against the husband only, and judgment against the community property was sustained. By reference to the briefs in that case, however, we find that, by the verdict, the jury specifically found that the community was liable, and the judgment was, therefore, in conformity to the verdict. The subject, however, was in issue in this case, and, in the absence of a finding thereon by the jury, we believe the judgment does not conform to the verdict, as required by the statute.

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Syllabus.

The judgment is therefore affirmed, except as to that part which declares it to be enforceable against community property. The cause is remanded, with instructions to the trial court to modify the judgment in the particular named. In view of the modification of the judgment, the appellants are entitled to recover the costs on appeal, and it is so ordered.

FULLERTON, C. J., and DUNBAR, ANDERS, and MOUNT, JJ., concur.

[No. 4967. Decided December 20, 1904.]

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JOHN W. RICHARDS, *Respondent*, v. JULIUS REDELSHEIMER, *Appellant*.¹

COMMON LAW—STATUTES. The common law of England, as adopted by the territorial law of 1863, continues to be the law of this state, except so far as modified by statute.

FRAUDS, STATUTE OF—LEASES—ORAL AGREEMENT FOR LEASE. Under the English statute of frauds an oral agreement for a lease would be a lease at will only.

SAME—COMMON LAW. Bal. Code, § 4517, providing that contracts evidencing any incumbrance upon real estate shall be by deed, modifies the common law respecting oral leases for less than one year.

SAME—LEASES FOR LESS THAN ONE YEAR. Bal. Code, § 4568, providing that leases for less than one year may be in writing, without seal or acknowledgement, modifies § 4517 providing that they shall be by deed.

SAME—SPECIAL PROVISIONS NOT CONTROLLED BY GENERAL ACT. Bal. Code, §§ 4517 and 4568, respecting leases for less than one year, being special statutes, are not affected by the general statute of frauds, Bal. Code, § 4576, which, consequently, can have no application to leases of real property.

SAME—LEASES FOR LESS THAN ONE YEAR—COMMON LAW SUPERSEDED. The English statute of frauds is entirely superseded by

¹Reported in 78 Pac. 934.

our statutory enactments, and an oral lease of real estate for less than one year is within our statute of frauds and void, and the same is not a lease at will, as under the English common law.

SAME—ORAL AGREEMENT TO EXECUTE A LEASE. There is no distinction between an oral agreement to execute a lease of real estate and an oral lease, and they are both within our statute of frauds.

SAME—LEASE FROM MONTH TO MONTH. If an oral lease is good at all, it is as a lease from month to month, under Bal. Code, § 4569, and then only upon such part performance, by delivery of possession, as will take the same out of the operation of the statute of frauds.

LEASE—REAL OR PERSONAL PROPERTY—BUILDING TO BE MOVED TO CERTAIN LOT. An oral lease of a building, which was to take effect only when the building had been moved to a certain lot, can not be sustained as a lease of personal property, as it had reference to the building after it should become a part of the realty.

Appeal from a judgment of the superior court for King county, Griffin, J., entered October 6, 1903, upon the verdict of a jury rendered in favor of the plaintiff for \$1,900 damages for breach of an agreement to execute a lease. Reversed.

Richard Saxe Jones, for appellant.

William Martin and *W. A. Keene*, for respondent.

PER CURIAM.—The complaint alleges, that, on or about the 1st of October, 1901, the plaintiff was a tenant of the defendant, and was occupying the top floor of a building known as the Plummer building, at the corner of Third avenue and Union street, in the city of Seattle, and was conducting a lodging house therein; that he has fitted up said building with furniture, carpets, etc., at an expense of \$3,200; that, on or about said date, the defendant entered into an oral agreement with the plaintiff that he would remove said building to the corner of Pine street and Third avenue, and refit the same with all modern improvements for a lodging house, and would

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permit him to occupy it upon the following terms: first month, rent to be free; the next six months, rent to be \$100 per month; and thereafter, rent \$150 per month. The plaintiff agreed to the terms of the agreement, and was permitted to leave his furniture in the building while the same was being removed. The building was completed and ready for occupancy about the 1st of August, 1902.

The complaint further states that, without notice to the plaintiff, and in violation of said agreement, the defendant removed plaintiff's furniture, bedding, and other property, on or about the — day of —, 1902, to a warehouse, and refused to permit plaintiff to re-enter said premises, or to replace his goods or furniture therein, and refused to rent said building as refitted, or at all, to the plaintiff. Plaintiff brought an action for damages in the sum of \$7,500, and recovered a verdict before a jury in the sum of \$1,900. The defendant duly made a motion for a new trial, and a motion for judgment *non obstante veredicto*, which motions were denied, and judgment entered on the verdict. Defendant appeals.

There are substantially four questions involved in this appeal: (1) To what extent, if at all, is the English statute of frauds in force in this state? (2) Is an oral lease of real estate for less than a year within the statute of frauds? (3) Is an oral contract to execute a written lease of real estate within the statute? And (4) was the contract in question a contract to lease real or personal property?

While, as a matter of fact, the only question with which we have to deal is as to the effect of an oral contract concerning real estate, the discussion must necessarily take a much wider range. This seems to be the first time that the question has been directly raised as to whether the

English statute of frauds is in force in this state. From an examination of the statutes of Oregon territory, during the time when this state was embraced within its geographical limits, there seems not to have been any legislation materially affecting the English statute of frauds. Hence, the common law, as adopted by our legislature in 1863, in so far as the same was not incompatible with our conditions, including the statute law of England as it existed at the date of the Declaration of Independence, became the common law of the late territory of Washington, and, by virtue of the constitution, the law of this state, and still continues to be the law, except in so far as it has been modified by legislative enactment. *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. 56, 15 L. R. A. 784.

The first four sections thereof are as follows:

“§ 1. All leases, estates, interests of freehold or terms of years, or any uncertain interest of, in or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law usage, to the contrary notwithstanding.

“§ 2. Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount to two-third parts at the least of the full improved value of the thing demised.

“§ 3. And, moreover, that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tene-

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ments, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

"§ 4. No action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."

Under the above statute, the lease in question would be a lease at will. Section 4517, Bal. Code, is first found in the session laws of 1854, and has been brought down to the present time in substantially the same language. It is as follows:

"§ 4517. All conveyance of real estate, or of any interest therein, and all contracts evidencing any incumbrance upon real estate shall be by deed."

A lease is an incumbrance. *Hoover v. Chambers*, 3 Wash. Ter. 26, 13 Pac. 547.

"§ 4518. A deed shall be in writing signed by the party bound thereby, and acknowledged by the party making it, before some person authorized by the laws of this state to take the acknowledgment of deeds."

"§ 4568. Tenancies from year to year are hereby abolished except when the same are created by express written contract. Leases may be in writing or print, or

partly in writing and partly in print, and shall be legal and valid for any term or period not exceeding one year, without acknowledgment, witnesses, or seals."

"§ 4569. When premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable, and shall be terminated by written notice of thirty days or more, preceding the end of any of said months or periods, given by either party to the other."

Section 4576 provides that "every agreement that by its terms is not to be performed within one year from the date of the making thereof" shall be void, unless such agreement or some note or memorandum thereof be in writing, signed by the party to be charged therewith, etc. It is apparent, from the provisions of § 4517, that the common law has been modified to the extent of providing that all conveyances of real estate, or of any interest therein, or contract evidencing any incumbrance thereon, shall be by deed. The provisions of § 4517, *supra*, are next modified by § 4568 (which is to be found first in the laws of 1867, p. 101), by providing that leases for less than a year may be in writing, etc., without seal or acknowledgment.

Sections 4517 and 4568 are special statutes applying to conveyances of interests in real estate, and, therefore, not affected by any implication which may be found in § 4576, *supra*, which is a general statute applying to all contracts not otherwise specially provided for. It is true, in *Ward v. Hinckley*, 26 Wash. 539, 67 Pac. 220, the court held an oral lease for less than a year valid, although the question was not argued in the briefs of counsel, nor was the attention of the court called to § 4569. In order to give force to both §§ 4568 and 4576, we are compelled to hold that

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§ 4576 has no application to leases of real property. The legislature cannot be presumed to have done an idle thing, and when, in § 4568, it provided that, "Leases may be in writing or in print or partly in writing and partly in print, and shall be legal and valid for any term or period not exceeding one year, without acknowledgment, witnesses or seals," it must be assumed that it intended thereby to modify §4517, which provides that all contracts evidencing any incumbrance upon real estate shall be by deed. These different statutes, it seems to us, entirely supersede the English statute of frauds relating to real property.

In *Brown v. Baruch*, 24 Wash. 572, 64 Pac. 789, an oral lease was sustained on the ground of an estoppel. The case of *Colcord v. Leddy*, 4 Wash. 791, 31 Pac. 320, has no application here, for the reason that the contract under consideration there was a written contract; and the same may be said of *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976. This seems to dispose of the first and second questions.

When we come to consider the history of the statute, and the abuses which it sought to correct, principal among them being the tendency to fraud and perjury, it is difficult to distinguish any substantial difference between an oral contract to execute a written lease of real estate and an oral lease of real estate. For instance, an oral lease, which was clearly within the statute, could be construed to be a contract for a lease, and thus take the case out of the statute, and accomplish indirectly what could not be done directly. *Brown*, Statute of Frauds, 139, and cases therein cited.

It was held, in *Hawley v. Moody*, 24 Vt. 603, that, when a party entered into an oral agreement with another to meet him at a certain office, and there execute a

written lease of a certain tavern stand, and was paid a gold watch, which was accepted as payment of \$100 on said contract of lease, such a contract was within the statute of frauds. In *Ledford v. Farrell*, 34 N. C. 285, it is held that a verbal engagement to execute a written agreement to convey land is within the statute. In fact, the weight of authority is to the effect that all contracts conveying any interest in real estate, and all agreements to substantially execute written conveyances or leases of real estate, are within the statute, and must be in writing. 8 Am. & Eng. Enc. Law, p. 695 (1st ed.).

We cannot hold an oral lease to be a lease at will, under the first section of the English statute, for that statute is superseded by § 4517; hence, if an oral contract of lease is good at all, it must come under § 4569, and be construed to be a lease from month to month, and then only where the tenant has been put into possession. In other words, there must be such a part performance as will take the case out of the statute, in order to sustain an oral lease of real estate in any event.

Neither can we sustain the theory of the respondent that the contract sued upon was a contract of lease of personal property; for, by the terms of the contract, proven at the trial, the lease was not to take effect until the building was removed to the lot on the corner of Pine and Third avenue, and this contract was clearly with reference to the building which should become a part of the realty on the lot just mentioned, and not otherwise.

The judgment will be reversed.

[No. 5120. Decided December 21, 1904.]

THE NORTHWEST BRIDGE COMPANY, *Appellant*, v.
TACOMA SHIPBUILDING COMPANY *et al.*, *Respondents*.¹

MECHANICS' LIENS—INTEREST OF OWNER LESS THAN FREEHOLD. Under Bal. Code § 5901, where premises are held under a contract of sale, duly recorded, a mechanics' lien for improvements contracted for by the vendee is confined to the interest of the vendee in the land, notwithstanding the fact that the vendor, in the contract of sale, requires the construction of the improvement, since the contractor deals with the vendee at his peril, and the lien is lost in case of forfeiture of the vendee's interest.

MECHANICS' LIENS—PARTIES—COMMUNITY PROPERTY—FORECLOSURE—WIFE OF OWNER NECESSARY PARTY. The wife is a necessary party to an action to foreclose a mechanics' lien upon community property.

SAME—AMENDMENT BRINGING IN PARTY—EXPIRATION OF TIME LIMITED FOR FORECLOSURE. The interests of a wife or other party in real estate can not be subjected to a mechanics' lien when not originally made a party to the foreclosure suit and not brought in by amendment until after the expiration of the time limited for commencing the action.

MECHANICS' LIEN—NOTICE—SUFFICIENCY—AGENT OF AN AGENT. A notice that the materials were furnished and the work performed at the request of the S company, as agent for B, as agent for the owners, is not sufficient under Bal. Code § 5900 requiring it to have been done at the request of the agent of the owners.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered July 25, 1903, upon findings in favor of the defendants, dismissing on the merits an action to foreclose a mechanic's lien. Affirmed.

Frederick H. Murray, for appellant, upon the point that the vendor's interest is subject to the lien where the contract of sale requires the vendee to make improvements and stipulates for a forfeiture, cited: *Hickey v. Collom*,

¹Reported in 78 Pac. 996.

47 Minn. 565, 50 N. W. 919; *Paulsen v. Manske*, 126 Ill. 72, 18 N. E. 275, 9 Am. St. 532; *Hill v. Gill*, 40 Minn. 441, 42 N. W. 294; *Althen v. Tartoz*, 48 Minn. 18, 50 N. W. 828, 31 Am. St. 616; *Henderson v. Connelly*, 123 Ill. 98, 14 N. E. 1, 5 Am. St. 490; *Kremer v. Walton*, 11 Wash. 120, 39 Pac. 374, 48 Am. St. 870; *Kremer v. Walton*, 16 Wash. 139, 47 Pac. 238; *Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686; *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231.

E. R. York, for respondents.

DUNBAR, J.—This is an action to foreclose a mechanics' lien upon a certain seven-acre tract. William E. Bowen, as agent or trustee for certain of the respondents, entered into a contract with the state of Washington for the purchase of said tract, with other adjoining lands, and, it is alleged in the complaint, entered into a contract with the Tacoma Shipbuilding Company for the purpose of making certain improvements on said land, and, upon the payment of certain money, agreed to convey said contract to said shipbuilding company. Said shipbuilding company went into possession of the said tract, and contracted with the Northwest Bridge Company for the construction of a portion of the improvements on said property, required by the contract of Bowen, agent, with the shipbuilding company. The agreement between Bowen and the shipbuilding company was duly filed for record, and recorded in the office of the auditor of Pierce county on April 30, 1901. This supplemental agreement provided that, in case the shipbuilding company should expend certain moneys in the construction of certain vessels, shipyards, and improvements on said tide lands and adjacent property, within a prescribed time, Bowen, as agent, would convey the said seven acres

of tide lands to that company; but in case it failed to do so, then the supplemental agreement, and the agreement to convey, should, at the option of Bowen, as agent, cease and become void.

On September 15, 1901, the shipbuilding company contracted with appellant to furnish materials and labor in the construction of a shipyard, and other work on said land. The shipbuilding company failed to expend the moneys, or construct the buildings or improvements, provided for by the said supplemental agreement between Bowen, agent, and the shipbuilding company; and Bowen elected to exercise his option, gave notice in writing to the company to cancel and declare null and void the agreement to convey, on account of non-compliance of the company with the terms of the supplemental agreement, and requested the company to execute and return to him a formal cancellation of the agreement, to be filed to clear the title of record, which formal cancellation was made by the company and afterwards filed.

Thereafter, on March 5, 1902, appellant filed its notice or claim of lien for \$1,280, on the tide land described in the agreement, alleging in said notice that the work was done and material furnished at the request of the Tacoma Shipbuilding Company, as agent of William E. Bowen, as agent for William L. McCabe *et al.* The shipbuilding company was adjudged insolvent, action was brought to foreclose the lien, the shipbuilding company defaulted, judgment was entered against the shipbuilding company and in favor of Bowen, agent, holding the lien invalid, and decreeing that respondents be dismissed, with their costs; from which decree plaintiff appeals.

It is the first contention of the appellant that, if, in a contract of sale, the vendor requires the construction of an improvement, his interest is subject to mechanics'

liens for work done and materials furnished at the instance of the vendee. Section 5901, Bal. Code, provides that:

"The land upon which the property subject to the lien created by the last preceding section is situate, or which is a part thereof, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment in a foreclosure of the lien, is also subject to the lien, if at the commencement of the performance of the labor or of the furnishing of the materials, the land belonged to the person who, in his own behalf, or who, through any of the persons designated in the last preceding section to be the agent of the owner, caused the performance of the labor, or the construction, alteration, or repair of the property subject to the lien; Provided, That if such person own less than a fee simple in such land, then only his interest therein is subject to the lien."

The proviso, we think, has reference to the person who caused the work to be done or material furnished. Such is the construction given the statute by this court in *Mentzer v. Peters*, 6 Wash. 540, 33 Pac. 1078, which is a case parallel in principle with the one at bar, as will be seen from the following quotation from the opinion:

"It fully appears that Denham had nothing to do with the construction of this building, or the purchasing of the material therefor. [Denham being the owner of the lot upon which the lien was sought to be enforced.] There was no foundation whatever for the rendition of any personal judgment against him in the proofs, nor can the lien upon the premises be sustained. Niehoff [who employed Peters to construct the building thereon] had possession of the premises under said contract of purchase. This contract was conditioned upon his making payment therefor, and he caused the work in question to be done while he was in possession under the contract.

Subsequently he made default in the terms of the contract, and his rights thereunder were forfeited and lost, and Denham became repossessed of the premises on which he had held the legal title during all of said times. Such being the facts, this case falls within the decision rendered in *St. Paul & Tacoma Lumber Co. v. Bolton*, 5 Wash. 763, 32 Pac. 787, decided since this case was tried. The lien could have attached only upon the interest of the defendant Niehoff, and he lost this through his failure to comply with his contract of purchase."

So in this case, the record shows that the terms of the contract between Bowen and the shipbuilding company had been made a matter of public record, and the appellant had at least constructive notice of the shipbuilding company's interest, and its liability to forfeit that interest, and it dealt with it at its peril. See, *Illiff v. Forssell*, 7 Wash. 225, 34 Pac. 928.

In addition to this, the court found that the property upon which the lien was sought to be obtained was community property; that all of the respondents, excepting McCabe and the Tacoma Tug & Barge Company, were married men. This finding was not excepted to, and must, therefore, be considered a fact in this case. And it was also found, and is not denied, that the wives of respondents Thomas S. Barley, Francis J. LaFarge, William E. Bowen, S. J. Maxwell, George Arkley, John Arkley, and E. S. Hamilton were not made parties to the action, either by notice or by service of summons. It was decided in *Littell & Smythe Mfg. Co. v. Miller*, 3 Wash. 480, 28 Pac. 1035, and *Sagmeister v. Foss*, 4 Wash. 320, 30 Pac. 80, 744, that a wife was a necessary party to the foreclosure of a lien on community real estate. This position has been maintained by an unbroken line of authority ever since.

It is true that, by amended complaint filed on April

27, 1903, the wives of the respondents were brought into the action, but this was long after the statutory period for bringing the foreclosure suit had expired, and, under such circumstances, the court had no jurisdiction to pronounce judgment against them. This case falls squarely within the rule announced in *Peterson v. Dillon*, 27 Wash. 378, 67 Pac. 397, where it was said:

"The wife was not made a party to the proceedings to foreclose the lien in the case under consideration until September 15, 1900, when the two actions were consolidated. The lien notice was filed on the 19th day of August, 1899, more than a year before the wife was brought in. The property at that time, by operation of law, had ceased to be bound by the lien, because no action sufficient to bind the property had been commenced within eight months after the filing of the lien to enforce the same. The judgment of the court below, so far as it attempts to foreclose the lien on the lot in question, was void."

The principle announced in this case was reaffirmed in *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389, where it was said:

"We have held in *Peterson v. Dillon*, *supra*, that this action must be commenced against both spouses within the time limited or the court has not jurisdiction to enforce the lien against the community property."

It is contended, however, by the appellant that, in any event, the respondent McCabe was not a married man, and that, as to him and the respondent corporation, Tacoma Tug & Barge Company, the lien would attach to their interests. The Tacoma Tug & Barge Company was not made a party to the action until the time at which the wives of the respondents were made parties, and would therefore fall within the same rule; but it seems to us that, at the threshold of the case, the notice was

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Syllabus.

not sufficient. Section 5900, Bal. Code, provides the right of lien to every person performing labor or furnishing material upon property at the instance of the owner or his agent. The lien notice, and the amended complaint in this case, both allege that the materials were furnished and work done at the request of the ship-building company, as agent of William E. Bowen, as agent for William L. McCabe, Thomas S. Burley, Francis J. LaFarge, William E. Bowen, S. J. Maxwell, George Arkley, John Arkley, and E. S. Hamilton. It seems to us that this allegation goes beyond the provisions of the statute, and that no authority is shown which binds the respondents in this case.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

[No. 5122. Decided December 22, 1904.]

MARK McCLAMMY *et al.*, Respondents, v. CITY OF SPOKANE, Appellant.¹

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE—PLEADINGS—EVIDENCE—VARIANCE—PERMIT TO REPAIR WALK. In an action for personal injuries sustained in a fall through a trap door in the sidewalk, in which the city is alleged to have granted a permit to repair the sidewalk and trap door, it is not a variance to prove a permit to construct a brick walk at the same place.

SAME—LIABILITY OF CITY—NEGLIGENCE OF PRIVATE CONTRACTOR. Where a city grants a permit to repair a sidewalk, it is charged with notice of the work and with the duty to see that the work is properly conducted.

SAME—DEFECTIVE SIDEWALK — EVIDENCE — SUFFICIENCY—QUESTION FOR JURY. In an action for personal injuries sustained in a fall through a trap door in a sidewalk, the questions of the neg-

¹Reported in 78 Pac. 912.

ligence of the city, and the contributory negligence of the plaintiff, are for the jury where it appears that the city granted a permit for a new walk in front of a lodging house, that it was necessary to cross the trap door to enter the house, that, while the repairs were in progress, and the trap door appeared as it always had, and there was no barrier, it gave way with plaintiff, she having but recently crossed it, and having been informed by the man in charge of the work that it was safe; and the fact that the plaintiff could have gained access to the building by a back stairway, which was old and unsafe, does not alter the case.

Appeal from an order of the superior court for Spokane county, Belt, J., entered December 31, 1903, granting a new trial, after having sustained a challenge to plaintiff's evidence and discharged the jury, in an action for personal injuries sustained in a fall through a trap door in the sidewalk. Affirmed.

John P. Judson, A. H. Kenyon, and A. G. Avery, for appellant.

Roche & Onstine and E. H. Sullivan, for respondents.

HADLEY, J.—This suit was brought by the respondents, who are husband and wife, against the appellant, to recover damages for injuries received by respondent Etta McClammy from falling through a trap door opening upon a sidewalk. The owner of the adjoining property, R. W. Mott, was made a party defendant, but he was not served with summons, and did not appear in the action.

The complaint, briefly stated, alleges, that the part of the sidewalk in front of the building known as the Mott block, on Main avenue, in the city of Spokane, is one of the principal traveled sidewalks in said city; that on or about the 17th day of October, 1902, and for some time prior thereto, the defendants negligently permitted said sidewalk, and a large trap door therein, to become out of repair and dangerous; that theretofore, on

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or about the 7th day of October, 1902, the defendant city gave to said Mott written permission to repair the sidewalk and trap door, and that, in pursuance thereof, some of the boards of the sidewalk were torn up, and that the trap door was thereby rendered more dangerous; that no guards were placed there, and no notice of any kind was given to the public of said dangerous condition; that, on the date first above mentioned, the injured respondent was traveling upon the sidewalk, going to her residence in the said Mott block, and as she came directly in front of the entrance to said building, upon said trap door, the latter gave way, whereby she was thrown to the bottom of a basement stairway, and seriously injured.

The answer consists of general denials, and affirmative allegations of fact which are claimed to amount to contributory negligence. The cause was tried before the court and a jury. At the conclusion of the evidence, the city challenged the sufficiency thereof to authorize a verdict in favor of respondents. The challenge was granted, and the jury discharged. Respondent then moved for a new trial, which was granted, for the reason, as stated in the order upon the motion for new trial, "that the city's liability, and the question of contributory negligence, should have been submitted to the jury." The city has appealed from the order granting a new trial.

Appellant urges that the evidence does not sustain the averment that the city granted a permit to repair the sidewalk and trap door, but that it was a permit to construct a brick sidewalk. Such is the wording of the permit, but the place for the brick walk to be constructed was described in the permit, and it was at the same place where the board walk and trap door then existed. It seems to us that no material distinction should

be drawn between the allegations of the complaint and the language of the permit, so far as appellant's relations to the circumstances were concerned. Either the building of a brick sidewalk there, or the repair of the board one, which was alleged to be old and rotten, involved a tearing up of material and a change of conditions, rendering the place more or less dangerous to the traveling public. It is of such change of conditions, and lack of protection therefrom, that respondents complain, and we think the evidence as to the permit in its material effect supports the averments of the complaint.

The city was chargeable with notice of the conditions. The permit says that the work shall be done "under the supervision and direction of the city engineer." Thus, while it is true the property owner was doing the work through his own contractor, yet he was under the immediate supervision and direction of an officer of the city. The time limit for doing the work was fixed in the permit at fifteen days, and the fact that the permit was granted became notice to the city that the work was in progress, and charged it with the duty of seeing that it was properly conducted.

"The duty to properly guard the excavations, although it was a public work and carried on by independent contractors, rested primarily upon the city. This duty it could not delegate so as to escape liability for its non-performance as against any person lawfully traveling upon the street." *Drake v. Seattle*, 30 Wash. 81, 70 Pac. 231.

See, also, *Noll v. Seattle*, 30 Wash. 28, 69 Pac. 382; *Beall v. Seattle*, 28 Wash. 593, 69 Pac. 12.

"The city cannot escape responsibility upon the theory that the unsafe condition of the walk was brought about by the act of the owner of the abutting property. If from the evidence the jury might properly have found that the

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authorities had either actual or constructive notice of such unsafe condition, and failed thereafter within a reasonable time to make, or cause it to be made, safe, its responsibility to the public and to the plaintiff is in no way lessened or affected by the fact that it had, prior to the accident, granted a permit to the owner to make the excavation. Under any and all circumstances it is liable for such injuries arising from defects in public walks as the exercise of ordinary care upon the part of its authorities would prevent,”
Sproul v. Seattle, 17 Wash. 256, 49 Pac. 489.

The duty of the city in the premises is, therefore, plain. The question here, however, is: Was the evidence such that it was for the court to decide, as a matter of law, that the city had discharged its duty? There is dispute as to whether any or sufficient barriers were placed across this sidewalk, at the ends of the strip being improved, by way of notice to the public that it was unsafe. In any event, there does not appear to have been any barrier against going upon the trap door, which it was necessary to cross in order to reach the front entrance to the building where respondent resided. Persons had hitherto, and up to this time, passed into and out of the building over this door. The respondent had herself passed out over it but a few minutes before. The evidence conflicts as to how much of the board walk was torn up at that time, and as to whether it was removed up near to the trap door on both sides. The respondent was asked as to the appearance of the trap door when she went out, and replied: “The same as it always had. I did not see any difference in it whatever.” As to what occurred a few minutes later, when respondent returned, she testified as follows: “When I came back, why, there was a lady coming out, and she just went across, and there was two men standing there, Mr. Dyce

and Mr. Green, and Mr. Green put out his hand and said: 'Is that safe?' Mr. Dyee said: 'Oh, yes, go ahead.' Then I went to step up to the main entrance, and I fell." The Mr. Dyee mentioned was in charge of that work. Under these circumstances, we think it was not for the court to say, as a matter of law, that no negligence appeared on the part of the city, but that was a fact for the jury to determine.

The question of contributory negligence was also for the jury. Under the circumstances already detailed, there is room in the minds of reasonable men for difference of opinion upon that subject, and it should not be said, as a matter of law, that respondent negligently contributed to her own injury. In this connection appellant also urges the additional circumstance that there was a back stairway, of which respondent knew, and by which she could have gained access to the building in which she resided. That fact, however, does not necessarily establish contributory negligence. The stairway was an outside one, and there was much evidence to the effect that it was old and rickety, and unsafe. These questions of negligence, under the evidence disclosed in the record, were for the jury, and the court did not err in granting the new trial.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, ANDERS, and DUNBAR, JJ., concur.

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36	345
42	50
42	55
42	124
42	131
42	132

[No. 5179. Decided December 22, 1904.]

CLOYCE CONINE, *Appellant*, v. OLYMPIA LOGGING
COMPANY, *Respondent*.¹

MASTER AND SERVANT—NEGLIGENCE—FAILURE TO PROVIDE SAFE METHOD OF DOING BUSINESS—STARTING LOGGING ENGINE WITHOUT WARNING—COMPLAINT—SUFFICIENCY. In an action for personal injuries sustained through the negligent starting of a logging engine without giving warning, the complaint is sufficient, as against a general demurrer, where it is alleged that the defendant's donkey engine used for dragging logs with a cable was beyond the view of the men attaching the logs, that the defendant negligently failed to supply any appliance by which the engineer could signal to the men that he was about to start the engine, that it was customary and the defendant's adopted method of doing business not to start the engine until the men had signalled to the engineer, and that the engineer negligently started the engine without waiting for such signal, or giving the plaintiff any notice, whereby the plaintiff, who was attaching the logs in his regular line of duty, was injured.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered January 26, 1904, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries sustained by a logger by reason of the sudden starting of an engine and the tautening of a cable. Reversed.

Phil Skillman and *J. W. Robinson*, for appellant.

Israel & Mackay, for respondent.

HADLEY, J.—Appellant brought this action to recover damages for injuries received while he was working in respondent's logging camp. The complaint avers, that, in the prosecution of its business, the respondent used modern logging appliances in the way of machinery and cables, to drag the logs from the places where they were

¹Reported in 78 Pac. 932.

out in the woods to the places where they were loaded on the cars for transportation to the market; that a donkey engine was used for dragging the logs upon the ground, and that, by means of a cable, the engine was connected with the logs some distance from it; that a signal wire or rope was strung from the engine to the place where the cable was fastened to the logs, so that respondent's employees, in charge of the work of attaching the cable to the logs, could give a signal to the engineer at the engine, thus notifying him that all was in readiness for the engine to start and drag the logs; that such a signal wire or rope was used at the time the appellant's injuries were received, and that it furnished the only means of signalling from the location of the logs in the woods to the engineer at the engine; that, under the rule established by respondent company, the engineer was required to await the signal before starting the engine and moving the logs; that appellant was engaged in attaching the cable to logs, and before he had finished the work of attaching it to certain logs, before he was ready to give, or did give, any signal, and without any warning whatever to appellant, the engineer started the engine, and appellant was thereby injured. It is further averred that the place where appellant was injured was sixty rods distant from the location of the engine, and could not be seen from the place of the engine; that the aforesaid signal wire or rope was the only means provided for communication between the two points; that the respondent negligently failed to provide any means by which the engineer could signal the appellant that he was about to start the engine, so that appellant could protect himself from injury. Respondent demurred generally to the complaint, and the demurrer was sustained. Appellant stood upon the complaint, refusing to plead further, and judgment was thereupon

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entered dismissing the action. The plaintiff has appealed.

Respondent urges that the complaint discloses no negligence on its part, and that any negligence which appears is clearly that of a fellow servant. Negligence of the engineer is alleged, and, while appellant asserts in his brief that respondent was negligent in having employed an incompetent engineer, yet he neither alleged in the complaint that the engineer was in fact incompetent, nor that the respondent continued him in its employ when it knew, or should have known, that he was incompetent. The complaint therefore tenders no issue as to the incompetence of the engineer.

It is also averred that the appliances which were used by respondent were modern, and that allegation standing alone would seem to negative the idea that there was any negligence in furnishing proper appliances. The additional allegation, however, that respondent negligently failed to provide any appliance by which the engineer could signal the man at the logs materially modifies the former one. What is, at least by the pleader, called negligence, is thus directly charged to respondent. It remains to be determined whether the fact characterized in the pleading as being negligence should be held as a matter of law not to be such. This necessarily calls for an analysis of the relative situation of the persons concerned. The respondent was the employer of both the engineer and appellant, and each was at the post assigned to him by his employer. They were distant from each other sixty rods. Intervening things obstructed the view from one to the other. This method of prosecuting the business had been adopted and directed by respondent. To meet the emergencies of this peculiar situation, respondent had provided means for signals from the location of the logs to the engi-

neer; but from the complaint it appears that no contrivance was supplied by which the engineer could signal the men at the logs. As against demurrer, at least, the complaint seems sufficiently to charge that an available appliance could have been as successfully supplied for one purpose as for the other. The charge is that the engine was started without any signal or warning to appellant, and that, by reason thereof, he was injured.

He was certainly without fault, under the circumstances detailed in the complaint. He could not see the engine or the engineer. His work necessarily placed him in contact with the dangerous surroundings, and it was the duty of respondent to furnish as reasonably safe contrivances to guard him against danger as the circumstances and nature of the business in hand would permit. If appellant had been warned that the engine was about to start, it must be assumed here that he would have escaped injury. His injuries were caused by the starting of the engine. The engineer being provided with no means to give warning that he was about to start the engine, then, whether the start was rightfully or wrongfully made on his part, or whether it was done under some misapprehension or misunderstanding, the fact remains that, if signalling means had been provided, he could have signalled appellant that the engine was about to start, and thus have given him notice to remove himself from the place of danger. While the complaint charges negligence of the engineer, yet it does not charge that his negligence was the sole proximate cause of the accident. The effect of all the allegations, taken together, is to charge that the negligence of the engineer was a concurring cause with negligence of the respondent.

In *Costa v. Pacific Coast Company*, 26 Wash. 138, 66 Pac. 398, this court said:

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"In other words, it is not clear that Castrania, if negligent as a matter of law, was the sole, direct, proximate cause of the accident; but his acts may be viewed, rather, as a concurring cause with the negligence of appellant. The rule seems to be that the negligence of a fellow servant does not excuse the master from liability to a co-servant for an injury which would not have happened had the master performed his duty."

See, also, *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365.

Moreover, the situation outlined in the complaint may be said to come within the rule declared in *Cooper v. Mullins*, 30 Ga. 146, 76 Am. Dec. 638. In that opinion, after stating the general rule to be that one injured by the negligence of a servant in his master's business is entitled to redress, it is said that the railroad company in the case claimed an exception to the rule as against other servants of the same master. The exception to the rule is conceded by the court and, after stating the reason for it, the opinion continues:

"This reason can have no application to employees whose situations allow them no connective influence over each other. . . . It follows therefore that the cases to which this exception applies are only those where the servant receiving the injury is engaged with the servant inflicting it in a common business where he has an opportunity to exercise a preventive care over his negligence."

The above case was cited approvingly upon this point in *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537, 53 Pac. 727; *Bateman v. Peninsular R. Co.*, 20 Wash. 133, 54 Pac. 996; *Uren v. Golden Tunnel Mining Co.*, 24 Wash. 261, 64 Pac. 174. We think the doctrine of the cited Georgia case, repeatedly approved by this court, applies to the case stated in the complaint now before us. The situation alleged, as we have seen, was such that appellant could not see the engineer, and had

not an opportunity to exercise any preventive influence over him, or to guard himself against the act of starting the engine at the time it was done. They were neither in sight, nor within reasonable hearing distance of each other. While the work of each was directed to a common end, yet they were so remote from each other that they had no opportunity for the connective influence by which one fellow servant is required to guard himself against the neglect of another, and it appears that sufficient means for so doing had not been supplied by respondent.

For the foregoing reasons, we believe the complaint is sufficient as against demurrer, and that it states a cause of action. The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer.

DUNBAR, ANDERS, and MOUNT, JJ., concur.

(No. 5409. Decided December 22, 1904.)

THE STATE OF WASHINGTON, *Respondent*, v. ROBERT L.
CHANEY, *Appellant*.¹

BARBERS—REGULATION OF—REVOCATION OF LICENSE TO PRACTICE TRADE—CONSTRUCTION OF ACT. Laws 1901, p. 345, providing for the licensing of barbers, and creating a board to regulate the practice of the trade, gives such board power to revoke a certificate for the causes specified, issued to barbers who were following the occupation at the time the act went into effect as well as to those who were not, there being no distinction between "certificates" to such barbers, and "certificates of registration" to barbers who afterwards apply and take the examination.

SAME—PENALTY FOR PRACTICE—REVOCATION OF LICENSE. Laws 1901, p. 349, providing a penalty for following the occupation of a barber without first having obtained a license, applies to one whose license had been regularly revoked, and who continued to practice without obtaining another license.

¹Reported in 78 Pac. 915.

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Opinion Per FULLERTON, C. J.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 4, 1904, upon a trial and conviction of the offense of violating the act regulating the occupation of barbering. Affirmed.

Shank & Smith and *Richard Winsor*, for appellant.

W. T. Scott, *R. W. Prigmore*, and *John B. Hart*, for respondent.

FULLERTON, C. J.—The appellant was convicted of violating the act regulating the occupation of barbering, and sentenced to pay a fine. From the judgment and sentence, he appeals.

From the record it appears that the appellant was engaged in the occupation of barbering, in the city of Seattle, at the time the act above referred to was enacted by the legislature and went into effect; that he complied with the provisions of that act within the time therein limited, by filing with the secretary of the board of examiners, thereby created, an affidavit, "setting forth his name, residence and length of time during which, and places where he had practiced such occupation," paid the license fee required, and received a certificate of registration, entitling him to follow his occupation in Seattle for one year thereafter. A year later he paid the charges required for a renewal certificate, and received such a certificate from the registration board; and again, in June, 1903, he paid to the secretary of the board the renewal fee, and received a receipt therefor from the secretary; but, owing to the fact that an inquiry was then pending as to the manner in which he was conducting his shop, a renewal certificate was not issued him. Later this inquiry developed into a trial before the board, which resulted in a finding by the board to the effect that the appellant was conducting his barber shop in "an un-

sanitary and filthy manner," and in a revocation of his certificate. The appellant, however, continued to follow his occupation, after such revocation, and this proceeding was prosecuted against him, with the result above stated.

The information upon which the appellant was convicted recited substantially the foregoing facts, and it is contended by counsel for the appellant that it does not state facts sufficient to constitute a crime; the precise contentions being, (1) that, under the terms of the act regulating the occupation of barbering, the board of examiners, thereby created, has no power or authority to revoke a certificate of registration, issued to barbers who were following the occupation of a barber at the time the act went into effect, but that the power conferred on the board in that behalf is confined to barbers who have commenced that occupation since the passage of the act; and (2) that the act provides no penalty for following the occupation of barbering after a certificate of registration has been revoked.

The sections of the act applicable to an understanding of these contentions are the following:

"§ 1. It shall be unlawful for any person to follow the occupation of barber in any incorporated city or town in this state, unless he shall have first obtained a certificate of registration as provided in this act: Provided, however, That nothing in this act shall apply to or affect any person who is now engaged in such occupation except as hereinafter provided. . . .

"§ 9. Every person now engaged in the occupation of barber in cities of the first, second or third class in this state shall within ninety days after the approval of this act file with the secretary of said board an affidavit setting forth his name, residence and length of time during which and the places where he has practiced such occupation, and shall pay to the secretary of said board one dollar, and a certificate entitling him to practice

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said occupation for one year shall thereupon be issued to him.

"§ 10. To obtain a certificate of registration under this act, any person excepting those mentioned in section nine shall make application of said board, and shall pay to the secretary an examination fee of five dollars, and shall present himself at the meeting of the board for examination of applicants. The board shall examine such person, and being satisfied that he is above the age of eighteen years, of good moral character, free from contagious or infectious disease, has studied the trade for two years as an apprentice under or as a qualified and practicing barber in this state, or other states, and is possessed of the requisite skill to properly perform all the duties, including his ability in the preparation of the tools used, shaving, cutting of the hair and beard and all the various services incident thereto, and has sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof in the practice of his trade, his name shall be entered by the board in a register hereinafter provided for and a certificate of registration shall be issued to him authorizing him to practice said trade in this state, for one year. All certificates shall be renewed each year, for which renewal, a fee of fifty cents shall be paid. All persons making application for examination under the provisions of this act, shall be allowed to practice the occupation of barber until the next meeting as designated by said board. . . .

"§ 12. Said board shall furnish to each person who has successfully passed examination, a certificate of registration, bearing the seal of the board and the signature of its president and secretary certifying that the holder thereof is entitled to practice the occupation of barber in this state, and it shall be the duty of the holder of such certificate to post the same in a conspicuous place in the shop.

"§ 13. Said board shall keep a register in which shall be entered names of all persons to whom certificates are

issued under this act, and said register shall be at all times open to public inspection.

"§ 14. Said board shall have power to revoke any certificate of registration granted by it under this act, for (a) conviction of crime, (b) drunkenness, (c) having or imparting any contagious or infectious disease or (d) for doing work in an unsanitary or filthy manner: Provided, That before any certificate shall be revoked the holder thereof shall have notice in writing of the change [charge] or charges against him, and shall at a day specified in said notice, at least five days after the service thereof be given a public hearing and full opportunity, to produce testimony in his behalf, and to confront the witnesses against him. Any person whose certificate has been so revoked may after expiration of ninety days upon application have the same re-issued to him upon satisfactory showing that disqualification has ceased.

"§ 15. Any person practicing the occupation of barber in any city of the first, second or third class in this state, without first having obtained a certificate of registration as provided in this act, or falsely pretending to be practicing such occupation under this act, or who uses, or allows towels to be used on more than one person before such towels have been laundered; or razors, lather, or hair brushes on more than one person before same shall have been sterilized, or in violation of any of the provisions of this act, and every proprietor of a barber shop who shall wilfully employ a barber who has not such a certificate shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, or by imprisonment in the county jail not less than ten days nor more than ninety days, or both." Laws of 1901, p. 349.

In support of his first contention, the appellant argues that the act makes a distinction as to the character of the certificates that are issued under the act; that the act provides for two characters of certificates, the first

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of which is called a "certificate," merely, while the second is called a "certificate of registration;" that the former is issued to barbers who were following that occupation at the time the act went into effect, and that, as to them, nothing further was provided or intended, but that they can follow their occupation from that time on, free from the supervision or control of the board of examiners; that a "certificate of registration" is issued only to those who seek to commence the occupation of barbering since the passage of the act, and it is such barbers only that the board have power to supervise and control, and whose authority to follow the business can be revoked for the causes enumerated in § 14.

It seems to us, however, that the appellant mistakes the effect of the language employed in the act. It is true, the act is not skillfully drawn, and is somewhat confusing in the language used, but its plain purpose was to regulate the occupation of barbering in this state, as practiced by all barbers, those already engaged in the business, as well as those who should engage in it after its passage; and that the word "certificate," and the phrase "certificate of registration," have one and the same meaning. The only distinction made, as we view it, is that it was intended by the legislature that those who should be engaged in the occupation of barbering, at the time the act went into effect, should be permitted to continue to do so without examination as to their qualifications, while those who should come in thereafter should submit to such examination; but all were to stand thereafter on an equal footing—all were required to obtain a certificate, in order to engage in the occupation, which certificate could be revoked for crime, drunkenness, if the holder became afflicted with contagious or infec-

tious diseases, or did his work in an unsanitary or filthy manner. This is gathered from the words of the act. By the first section, it is made unlawful for any person to follow the occupation of barber, in the designated places, without having a certificate of registration. By § 9, those engaged in the occupation, at the time of the passage of the act, were entitled to a certificate for one year on paying certain fees, without examination as to their qualifications. By § 10, those thereafter applying were required to pass an examination before a certificate could be issued to them. And, in the same section, it is provided that "all certificates" shall be renewed each year, and, by § 14, the board of examiners is given power to revoke any certificate for the acts therein enumerated. These sections, as we say, clearly imply that the only distinction to be made between the two classes was that those following the business in the designated districts, at the time of the passage of the act, did not have to pass an examination as to their qualifications in order to obtain a certificate, while those commencing business subsequent thereto were obligated to take such an examination. We conclude, therefore, that the board of examiners had power to revoke the appellant's certificate.

The second contention is founded upon the language of § 15. By that section, it will be noticed, a penalty is provided for "practicing the occupation of barber . . . without first having obtained a certificate of registration as provided in this act," which, it is said, is a different thing from practicing the occupation of barber after his certificate of registration had been revoked—the offense charged and proven against the appellant. But we think this distinction not well founded. A person who engages in the occupation, after his license is revoked,

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without procuring another one, is following the occupation "without first having obtained a certificate of registration," as much so as is a person who engages in the occupation without having obtained a certificate at all. Both stand on the same plane. Neither have a license, and each engage in the business. The fact that one, at some past time, held such a license, does not make their respective situations different.

The case of *Ex Parte McNulty*, 77 Cal. 164, 19 Pac. 237, 11 Am. St. 257, is cited by appellant as sustaining the last contention noticed. It will be observed, by an examination of the several opinions in that case, that this is not the ground upon which the decision is rested. Judge McFarland gave it as one of the reasons for granting the writ, and his opinion was concurred in by Judge Sharpstein. The other judges, however, who concurred in the judgment, do not urge this as one of the grounds for so doing, although they stated their reasons for concurring in the judgment in separate opinions. But if we are mistaken in this, and if it be true that the case, properly construed, does so hold, we would not follow it, as the reasoning upon which it is rested does not appeal to us as being either sound or conclusive.

The judgment is affirmed.

HADLEY, DUNBAR, ANDERS, and MOUNT, JJ., concur.

(No. 5034. Decided December 22, 1904.)

THE STATE OF WASHINGTON, *Respondent*, v. FRANK VAN
WATERS, *Appellant*.¹

APPEAL AND ERROR—RECORD—REVIEW—CRIMINAL LAW—TRIAL—ARRAIGNMENT—BRINGING TO TRIAL WITHIN SIXTY DAYS. The denial of a motion to dismiss a prosecution, made upon entering a plea forty-five days after the filing of the information, on the ground that there had been such a delay in the arraignment that the prisoner was unable to prepare for trial within sixty days from the time the information was filed, will not be reviewed on appeal where the record does not show at what time the appellant was arraigned, since the court can not presume that it was delayed beyond a reasonable time, or that no sufficient cause appeared for the delay.

SAME—ABUSE OF DISCRETION. The denial of a motion to dismiss a prosecution, made at the commencement of the trial sixty-three days after the filing of the information, upon the ground that the prisoner was not brought to trial within sixty days, under Bal. Code § 6911, so requiring unless good cause is shown for the delay, will not be reversed except for abuse of discretion, and can not be reviewed where the record on appeal fails to show the order of the court setting the cause for trial, or the proceedings had thereon, since the order must be presumed regular and on sufficient cause.

CRIMINAL LAW—TRIAL—INDORSEMENT OF NAMES OF WITNESSES ON INFORMATION. It is not error to permit the state to indorse on the information the names of additional witnesses on the day before the trial.

RAPE—JURORS—CHALLENGE FOR CAUSE—SITTING ON SIMILAR TRIAL. In a prosecution for rape committed on the person of a child under the age of consent, a juror who had sat upon a trial wherein another person had been convicted of a similar offense, committed upon the same prosecuting witness, is not disqualified, where the crimes were separate and distinct and committed at different times; and a challenge for cause is properly overruled.

APPEAL—REVIEW—TRIAL—IMPROPER ARGUMENT OF COUNSEL—EXCEPTIONS. Error can not be predicated upon improper argu-

¹Reported in 78 Pac. 897.

36	358
41	625
36	358
42	312

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ment of counsel to the jury, upon exceptions thereto, unless the trial court is moved to act in the matter, and exceptions are taken to its refusal to act.

SAME—CURING ERROR. Where an attorney is rebuked for commenting on matters outside of the record, and the jury is told to disregard the statements, the error is sufficiently cured.

CRIMINAL LAW—TRIAL—VERDICT—EVIDENCE—SUFFICIENCY. A verdict will not be set aside in a criminal case where the direct evidence of the prosecuting witness is corroborated on all the material issues.

APPEAL AND ERROR—DECISION—CRIMINAL LAW—EXCESSIVE SENTENCE. The power of the appellate court to reduce an excessive sentence being doubted, the propriety of reducing a sentence from twenty-five years to five years is suggested to the pardoning power.

Appeal from a judgment of the superior court for King county, Bell, J., entered October 17, 1903, upon a trial and conviction of the crime of rape. Affirmed.

Winsor & Hadley, for appellant.

W. T. Scott and Hermon W. Craven, for respondent.

FULLERTON, C. J.—The appellant was tried upon an information charging him with the crime of rape, committed upon the person of a female child under the age of consent, found guilty of such crime, and sentenced to imprisonment for a term of twenty-five years in the state penitentiary.

From the record it appears that the appellant was held to answer for the crime charged by a committing magistrate on the 16th day of June, 1903, that an information was filed against him on the 15th day of July, 1903, that he plead not guilty to the information on August 29, 1903, and that he was brought to trial on September 16, 1903. The record does not make it appear at what time he was arraigned, nor does it show when the cause was set for trial, nor the proceedings had at that time. At the

time the plea was taken, the appellant filed a written motion asking for a dismissal of the proceedings against him on the grounds, (1) that he was not brought to trial within sixty days after the information was filed against him, and (2) because he had not been arraigned until more than sixty days after his arrest, and (3) because he had been confined in jail more than sixty days without trial. This motion the court overruled. At the trial, after the jury had been selected and sworn, the motion was renewed, although in a little different form from the written motion, the appellant claiming that he had not been arraigned in time to fairly prepare for trial and be tried within sixty days after the information had been filed against him. This motion was also overruled, and these rulings constitute the first error assigned.

The Code (§ 6910, Ballinger's) provides that, when a person is held to answer by a committing magistrate, if no indictment or information be filed against him within thirty days, the court must order the prosecution dismissed, unless good cause to the contrary be shown. It also provides (§ 6884) that he must be arraigned after the filing of the indictment or information, but no time is fixed within which such arraignment must take place. By § 6911, it is provided that, if the defendant whose trial is not postponed on his own application be not brought to trial within sixty days after the indictment or information is filed, the proceedings against him must be dismissed, unless good cause to the contrary be shown. A comparison of the dates above given will show that twenty-nine days elapsed between the time the defendant was held to answer and the time the information was filed against him; that he plead to the information on the forty-fifth day after it was filed, and was brought to trial on the sixty-third day thereafter

The appellant first urges that he was entitled to a dismissal on his motion, both under the terms of the statute and the general rules governing the practice in like cases, but we think the record shows no error in the court's rulings in that regard. The only ground tenable for dismissing the prosecution, at the time the written motion was filed, was that there had been a delay in the arraignment of the appellant for such a length of time that he was unable to prepare for trial within sixty days from the time the information was filed, and was thereby denied the benefit of the statutory provision granting him that right. But there is not sufficient in the record to enable us to review these orders in that respect. As we have stated, the record does not show at what time the appellant was arraigned, and this court cannot presume that it was delayed beyond a reasonable time, or that no sufficient cause appeared for such delay. To make a claim of error of this kind reviewable in this court, the appellant must bring up enough of the record to show what was before the trial court when his motion was denied. To show that the information was filed on a certain day, and that he plead on another and a later day, is not enough. It may be that a sufficient cause intervened to warrant the delay, and it will be so presumed unless the contrary appears. In matters in which the trial court is vested with discretion, error is never presumed, but to be available must appear on the face of the record.

The same conclusion must follow the ruling on the motion made after the trial had been entered upon. True, it appeared that the trial was commenced more than sixty days after the information had been filed. But the statute does not make this an absolute ground for dismissal—it requires a dismissal only where good cause to the contrary is not shown. The question of what constitutes good cause

is one primarily for the discretion of the trial court, to be reviewed here only in cases of abuse. To so review such an order, this court must have the whole record. A showing that there was a delay beyond the statutory period is not sufficient; it must appear that no sufficient cause for the delay was shown in the trial court. As the record here fails to show the order of the court setting the cause for trial, or the proceedings had at that time, it must be presumed that the order was regular, and was made upon sufficient cause. The motion to dismiss was, therefore, properly denied.

It is next assigned that the court erred in permitting the state to indorse on the information names of additional witnesses for the state on the day before the trial. The statute on this subject permits the state to indorse the names of witnesses on the information at any time before trial, as the court may, by rule or otherwise, prescribe. The record before us shows simply an application in writing to indorse certain names of witnesses on the information, its service upon the appellant, and the order of the court, entered on the day preceding the trial, granting the application. From all that is shown here, it seems to us that there was not even a departure from the strict rule of the statute, much less was there such a departure as to amount to an abuse of discretion sufficiently gross to require a reversal of the cause. Moreover, this court has repeatedly held similar orders of the trial courts not to be error. *State v. Lee Doon*, 7 Wash. 308, 34 Pac. 1103; *State v. John Port Townsend*, 7 Wash. 462, 35 Pac. 367; *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *State v. Kelly*, 14 Wash. 702, 45 Pac. 38; *State v. Holedger*, 15 Wash. 443, 46 Pac. 652; *State v. Lewis*, 31 Wash. 515, 72 Pac. 121.

It appears that one Patchen, at some time prior to the trial of the appellant, had been tried and convicted of a

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like offense, committed upon the person of the prosecuting witness in this case. Certain jurors in attendance on the court, who had sat on the panel that had convicted Patchen, were called as trial jurors on the trial of the appellant. These were challenged for cause by the appellant, for the reason that they had sat as jurors in the former case. The challenge was denied by the court, and its ruling is assigned as error. There are cases which hold that a person who has sat as juror on the trial of a defendant is disqualified to sit on the trial of his co-defendant. The rule is founded on the principle that the second trial is but a retrial of the same offense, and that a juror who has heard and rendered a verdict in the first trial must necessarily have an opinion as to the guilt or innocence of the accused. But no such condition appears in the case before us. These were two distinct and separate crimes, committed at different times, having no relation, one with the other, save that they were of the same character and were committed on the same person. A juror who had been convinced of the guilt of the defendant in the first, could not, from that fact alone, have any knowledge or opinion as to the guilt or innocence of the defendant in the second, and, of course, would not be disqualified for that reason. We do not think the court committed error in its ruling.

In the course of his argument to the jury, the prosecuting attorney called attention to the opening statement of counsel for the appellant to the effect they would prove the appellant's good character, and stated that no witnesses to that effect had been produced. The appellant excepted to the statement, and contends here that the conduct of the prosecution was so prejudicial that the trial court should have granted a new trial. But if the remark was prejudicial, a question we do not decide, we think the

appellant has not brought it here for review. The remedy to correct misconduct of counsel is to move the trial court to act in the matter, and except to its refusal so to do, if it does so refuse; it is not enough merely to except to the supposed misconduct. *State v. Regan*, 8 Wash. 506, 36 Pac. 472; *State v. Bailey*, 31 Wash. 89, 71 Pac. 715. Another statement made by the prosecuting officer was excepted to also, but the court rebuked counsel for digressing from the record and told the jury to disregard the remark. The fault of the remark lay in the fact that it was a comment on something outside of the record, and we think it was sufficiently cured by the action of the court.

It is next urged that the evidence was insufficient to sustain the verdict, but on this point we do not find that the record leaves the question in doubt. On all the principal issues there was the direct evidence of the prosecuting witness, corroborated by her companion, and, it seems to us, also, a very substantial admission on the part of the defendant himself. This clearly was evidence sufficient to make a case for the jury, in which body rested the duty of determining its truth or falsity.

The sentence imposed by the court, while within the limitations of the statute, seems to us unnecessarily severe in the light of the evidence. If we felt that it was within our recognized powers we would direct a modification of it, reducing the period to five years. But our investigations lead us to doubt the authority of an appellate court to reduce or modify a sentence which is within the discretion of the trial court to impose, and we mention the matter here in the hope it may aid the appellant in inducing the pardoning power to exercise its clemency in his behalf after he has served a reasonable time.

The judgment is affirmed.

HADLEY, DUNBAR, ANDERS, and MOUNT, JJ., concur.

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Opinion Per MOUNT, J.

(No. 5319. Decided December 22, 1904.)

THE STATE OF WASHINGTON, *Respondent*, v. FRANK
THIELD, *Appellant*.¹

CRIMINAL LAW—INSTRUCTIONS—COMMENT ON FACTS. It is unlawful comment on the facts and reversible error for the trial judge to recall the jury, after they have deliberated for eighteen hours, and, in urging them to agree upon a verdict, to state that it is a very plain case, that they ought to arrive at a verdict without any trouble, and that he can see no reason why they should hesitate, since that was clearly insinuating that the verdict should be guilty.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 28, 1904, upon a trial and conviction of the crime of robbery. Reversed.

S. D. Wingate, for appellant.

W. T. Scott, for respondent.

MOUNT, J.—Appellant was convicted of the crime of robbery. Upon this appeal he alleges that the court erred in refusing a motion for a new trial upon the ground that the judge, when instructing the jury, commented upon the facts. After the evidence was all submitted and the court had instructed the jury, and after the jury had retired to consider their verdict, and eighteen hours had elapsed without a verdict, the jury was brought into the court room, where the following took place:

“The court: Gentlemen of the jury, have you agreed upon a verdict in this case yet? Foreman of the jury: We have not, your Honor. The court: I do not want you to tell me whether you are for or against acquittal, but how do you stand in number? The foreman: Eight to four, your Honor. The court: It seems to me, gentlemen of the jury, that you ought to agree on a verdict in this case. You twelve men know as much about this

¹Reported in 78 Pac. 919.

case as it is possible for any twelve men to know about it. Now it is quite proper for each one to have his opinion, but it is your duty as jurors to reason together and see if you cannot arrive at a verdict. Without in any way intimating what your verdict ought to be, because that is not my province, it does seem to me that this is a very plain case and that you gentlemen ought to arrive at a verdict without any trouble whatever. I can't for the life of me see any reason why twelve men should hesitate at arriving at a verdict in this case. As I said before, I am not intimating what your verdict should be. That is for you. But you certainly ought to reach a verdict in this case. You may go back to your room again, gentlemen of the jury, and see if you can't arrive at a verdict."

If there was no substantial evidence to go to the jury, it was the duty of the court to direct an acquittal and discharge the jury. If there was substantial evidence to go to the jury, it was the duty of the court to submit the case without comment upon the facts. Const., § 16, art. 4. In *State v. Crotts*, 22 Wash. 245, 60 Pac. 403, this court said:

"There are different ways by which a judge may comment upon the testimony, within the meaning of the constitution referred to above. The object of the constitutional provision, doubtless, is to prevent the jury from being influenced by knowledge conveyed to it by the court of what the court's opinion is on the testimony submitted. The constitution has made the jury the sole judge of the weight of the testimony, and of the credibility of the witnesses, and it is a fact, well and universally known by courts and practitioners, that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues. . . . There is no other constitution that we have been able to find that is as prohibitive of the action of the court in this respect as ours. Most of them are to the effect that the judge will

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not charge the jury in respect to matters of fact. Ours, it will be noticed, goes beyond that, and provides that they shall not comment thereon."

The remarks of the judge quoted above could mean but one thing to the jury, and that was that he believed the defendant was guilty. It is true, as argued by the prosecuting attorney, that the judge stated no fact. He even said, "Without in any way intimating what your verdict ought to be, because that is not my province." Yet he did intimate very plainly what his opinion was upon all the facts when he said, "it does seem to me that this is a very plain case, and that you gentlemen ought to arrive at a verdict without any trouble whatever. I can't for the life of me see any reason why twelve men should hesitate at arriving at a verdict in this case;" and then, protesting again that he was not intimating what the verdict should be, continued, "But you certainly ought to reach a verdict in this case." There can be no doubt that the judge meant that he believed the defendant guilty, and that the jury should so find. If he had stated to the jury, "Gentlemen, this defendant is guilty, but I am not stating what your verdict should be," it could not be reasonably contended that this was not error within the constitutional inhibition. While the judge protested that he was not intimating what the verdict should be, yet he did so intimate, as clearly to the mind of any reasonable man as if he had stated it directly. In the following cases comments substantially like the one under consideration were held error, viz., *People v. Kindleberger*, 100 Cal. 367, 34 Pac. 852; *State v. Ivanhoe*, 35 Or. 150, 57 Pac. 317; *State v. Fisher*, 23 Mont. 540, 59 Pac. 919; *State v. Chambers* (Idaho), 75 Pac. 274.

For this error the judgment is reversed and the cause remanded for a new trial.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

(No. 5095. Decided December 22, 1904.)

PATRICK LYNCH, *Appellant*, v. A. R. KINETH *et al.*,
Respondents.¹

ANIMALS—VICIOUS HORSES—INJURY INFLICTED BY RUNAWAY TEAM. The owners of a team of vicious horses of known propensity to run away are liable for all injury inflicted thereby, without proof of negligence or fault in endeavors to prevent the doing of the mischief.

SAME—NOTICE. Knowledge of the defendants' drivers of the vicious character of a runaway team is imputed to the owner.

ANIMALS—VICIOUS HORSES—NEGLIGENCE—INJURY INFLICTED BY RUNAWAY TEAM—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY—NONSUIT—QUESTION FOR JURY. In an action for personal injuries sustained by one who, while driving on the public highway, was run into by defendants' runaway team, alleged to be vicious and addicted to the habit of running away and driven by an incompetent servant, the questions whether the team was a "runaway" team and of plaintiff's contributory negligence, are for the jury, where it appears that the team had run away several times, and it can not be determined by the evidence as a matter of law either that the team did not have such vicious habit, or that plaintiff was guilty of contributory negligence.

Appeal from a judgment of the superior court for Island county, Hatch, J., entered September 18, 1903, upon granting a nonsuit, dismissing an action for personal injuries inflicted by the defendants' runaway team. Reversed.

James Anderson and *Coleman & Ballinger*, for appellant.

Lester Still and *H. W. Craven* (*Thos. T. Littell*, of counsel), for respondents.

DUNBAR, J.—This action was brought by appellant to recover \$10,715, as damages for personal injuries which

¹Reported in 78 Pac. 923.

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he claims to have sustained by reason of certain so-called negligent acts of respondents. It is alleged, that on or about July 25, 1902, the respondents were the owners of a team of horses which were wild, unruly, and vicious, and given and addicted to running away, and that respondents, knowing said horses to be of such disposition, permitted them on that day to be driven upon the public highway; that one Wanamaker, the driver of said horses on said occasion, was then and there careless and incompetent to manage and drive said team, all of which was well known to the respondents; that on said date, while said team was being driven by Wanamaker in the service of respondents on the public highway in Island county, the said team, in accordance with its wild and vicious habits, became ungovernable, and ran away with the wagon to which it was attached; that the driver did not control them, but leaped from the wagon, allowing the team, with said wagon, unattended, to continue running away on said highway, at a tremendous and reckless speed; that appellant was, at the time, riding on a load of lumber on said highway, going in an opposite direction, exercising due care and caution, when suddenly said team, still attached to their wagon, dashed, at great speed and with no one to guide or control them, around a bend in the road, and struck the wagon on which the appellant was riding, with great force, overturning the same, throwing the appellant violently to the ground, and throwing the lumber upon him, inflicting the injuries complained of. The answer denied any negligence on the part of the respondents, and alleged contributory negligence on the part of the appellant. Upon the conclusion of the introduction of appellant's evidence, the respondents moved for a nonsuit, which motion was sustained by the court. The cause was dismissed, and judgment for costs

entered against the appellant. From this judgment this appeal was taken.

It is the contention of the respondents, in brief, as gathered from a citation from the case of *Cadwell v. Arnheim*, 152 N. Y. 182, 46 N. E. 310, that there is no rule of law which compels a person driving horses upon a highway to keep them absolutely under control; that he is bound to exercise only that degree of diligence and care which a man of ordinary prudence might be expected to exercise under the same circumstances; that, in the course of the affairs of life, accidents must happen and, if they are not attributable to the breach of some legal duty owing to the sufferer, he is without legal right to complain. This, no doubt, is a correct statement of the law, but its application to the circumstances of this case is not discernible. The testimony is comparatively brief, and shows, in effect, that the team which was the cause of the injury was the team of respondents; that this team was in the habit of running away—that is to say, that it had run away several times—often enough, we think, to warrant the submission to a jury of the question whether it was a vicious team, addicted to the runaway habit. The highway is intended for the use of any one who desires to use it, and no one has a right to use it to the exclusion of others, or in such a manner as to imperil the rights of others; and the degree of care which would be required of one driving a horse that had a reputation for running away would be a greater degree of care than that required of the driver of a horse which was known to be gentle, reliable, and biddable. The general rule is thus stated in 2 Cyc. 368:

“The owner or keeper of a domestic animal not naturally inclined to commit mischief, while bound to exercise ordinary care to prevent injury being done by it to

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another, is not liable for such injury if the animal be rightfully in the place when the mischief is done, unless it is affirmatively shown, not only that the animal was vicious, but that the owner or keeper had knowledge of the fact. When such *scienter* exists, the owner or keeper is accountable for all the injury such animal may do, without proof of any negligence or fault in the keeping, and regardless of his endeavors to so keep the animal as to prevent the mischief."

And in relation to notice, it is stated, at page 378:

"Knowledge of a servant or agent of an animal's vicious propensities will be imputed to the master when such servant or agent has charge or control over the animal."

Knowledge of the vicious character of a horse, by one employed to drive it in delivering goods, is imputed to the owner. *Brown v. Green*, 1 Pennew. (Del.) 535, 42 Atl. 991. It was shown by the testimony in this case that the several different drivers employed by the respondents knew the tendency of this team to run away, as shown by the testimony of the drivers that the horses had, at different times, run away, or attempted to run away.

The respondents furnish in their brief an extended and earnest argument to show that the instances proven were instances of mild runaways, not exhibiting any particularly vicious tendencies on the part of the horses, but that they either ran under provocation, or did not run with any degree of velocity; while it is contended by the appellant that the testimony shows that the horses were what might be termed, in common parlance, "runaway horses." The necessity for the argument, outside of the testimony itself, shows that this is a case peculiarly adapted to the investigation of a jury to determine, from all the circumstances shown, the character of the horses in this regard. As early as the report of the case of

McQuillan v. Seattle, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799, it was decided by this court that the question of contributory negligence is for the jury to determine, from all the facts and circumstances of the particular case, and that it is only in rare cases that the court is justified in withdrawing it from the jury. The same doctrine prevails throughout with reference to the alleged negligence of defendants, and that has been the uniform holding of this court from that time until the present. In *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, the trial court, in this connection, gave the following instruction to the jury:

"You fix the standard for reasonable, prudent, and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved, and try it by that standard; and neither the judge who tries the case, nor any other person, can supply you with the criterion of judgment by any opinion he may have on that subject."

The supreme court of the United States, in passing upon this instruction, indorsed it in the following language:

"But it seems to us that the instruction was correct, as an abstract principle of law, and was also applicable to the facts brought out at the trial of the case. There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note

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the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under the same state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

This case was approved by this court in *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820, and the announcement of the law in that case has been uniformly adopted as the rule governing damage cases. The court, in the case just above cited, lays down the same rule in regard to contributory negligence, and says there is no more of an absolute standard of ordinary care and diligence in one instance than in the other. It cannot be determined from the testimony in this case that there could be no doubt as to whether this team was in the habit of running away. It cannot be determined, as a matter of law, that such was not the habit of the team, a determination which would have to be made before the court would be authorized in assuming to take the case from the jury and decide that question of fact itself. The same may be said of the contention of the respondents that the appellant was guilty of contributory negligence,

The judgment will be reversed and the cause remanded, with instructions to grant a new trial.

FULLERTON, C. J., and ANDERS, HADLEY, and MOUNT, JJ., concur.

(No. 5082. Decided December 22, 1904.)

L. D. SPENCER, *Appellant*, v. THE COMMERCIAL
COMPANY, *Respondent*.¹

APPEAL—REVIEW—FINDINGS. Where, in an action tried by the court after waiving a jury, the evidence is not brought up and the findings are within the issues, and warrant the conclusions of law, the merits of the case are not reviewable.

COSTS—ATTORNEY'S FEES. In an action for damages for breach of the covenants of a lease, it is error to allow an attorney's fee of \$100 in addition to the statutory fee.

APPEAL AND ERROR—EXCEPTIONS—SUFFICIENCY. Error in allowing an attorney's fee is properly presented for review in the appellate court by excepting to the allowance when first set forth in the conclusions of law; and, when it is part of the judgment, it is deemed excepted to, and need not be urged in the court below.

APPEAL AND ERROR—DECISION—ATTORNEY'S FEE—COSTS. Upon remanding a case wherein the only error was in allowing an attorney's fee in the sum of \$100, the judgment will be affirmed except as to said sum, with instructions to the lower court to modify the decree, the costs of the appeal to be taxed in favor of the appellant.

Appeal from a judgment of the superior court for King county, Griffin, J., entered November 11, 1903, upon findings in favor of the defendant, in an action for damages for breach of covenant, after a trial on the merits before the court, a jury being waived. Modified.

G. Ward Kemp, for appellant.

Ira Bronson and *Kenneth Mackintosh*, for respondent.

DUNBAR, J.—This was an action brought to recover damages from the defendant for alleged violation of the covenants of a lease, the main contention being that the lessor ejected the lessee from the premises leased, and

¹Reported in 78 Pac. 914.

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proceeded to collect the rents from the sub-lessees, to plaintiff's damage in the sum of \$1,260, the value of the fixtures which plaintiff alleged he was deprived of, and the sum of \$622.90, the value of the leasehold interest which defendant alleges he was deprived of, being the sum of \$1,884.90 in all.

The question of the right of the appellant to the value of the fixtures was decided adversely to appellant's contention by this court in *Spencer v. Commercial Co.*, 30 Wash. 520, 71 Pac. 53, upon a former appeal in this case. The case was tried by the court, a jury having been waived, and the court, after finding the execution of the lease, a copy of which it is not necessary to set out in this opinion, found, that during the month of August, 1899, the plaintiff surrendered and delivered possession of the premises to the defendant; that the defendant thereupon resumed possession thereof, and leased the same to the Seattle Cereal Company, and that the said Seattle Cereal Company thereupon became the tenant of the said premises, and so continued up to and until December 31, 1901, and that at the end of the said time the Seattle Cereal Company redelivered possession of said premises to defendant, and that the defendant thereupon resumed possession thereof; that subsequent to August, 1899, defendant received from the plaintiff no rent for said premises, and had no dealings of whatsoever kind with him in regard to said premises, but that, during all of said time, the said premises were in the possession of said Seattle Cereal Company as tenant of the defendant; and in August, 1899, plaintiff agreed with the defendant and the Seattle Cereal Company that he would surrender his lease, mentioned in finding No. 1, and would rent said premises from the Seattle Cereal Company; that, in compliance with said agreement, plaintiff, after August, 1899, paid no rent to said defendant, but

rented said premises from the Seattle Cereal Company. The appellant has not brought here the testimony in the case, so that the findings of fact must be accepted by this court as the facts proven. We think that they were within the issues, and that no other facts were necessary to be found by the court, and that the facts found by the court warrant the conclusions of law which followed. Neither are we able to conclude that the court abused its discretion in refusing the motion of the appellant for a new trial, so far as the merits of the controversy are concerned.

The judgment rendered, however, granted to the respondent, the defendant in the action below, an attorney's fee of \$100, in addition to the statutory attorney's fees. It has been so often decided that the granting of attorney's fees in cases of this kind was error that it is no longer a proper subject for discussion. It is contended, however, by the respondent that this question was not raised by the appellant in the lower court, and that he has no right to present it here. The finding, however, was objected to by the appellant at the earliest opportunity, by excepting to this allowance, which was set forth in the conclusions of law. And again, it is a part of the judgment, which is deemed excepted to.

As no good purpose would be subserved by the reversal of the judgment and the retrial of the cause by reason of this error alone, we will follow the rule announced in *Trumble v. Trumble*, 26 Wash. 133, 66 Pac. 124, and affirm the judgment except as to the allowance of the \$100 as attorney's fees, and remand the cause with instructions to the lower court to modify the decree in that regard; the costs of the appeal to be taxed in favor of appellant.

FULLERTON, C. J., and ANDERS, HADLEY, and MOUNT, JJ., concur.

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Opinion Per MOUNT, J.

(No. 5103. Decided December 22, 1904.)

*In the Matter of the Petition of E. G. THOMPSON for a
Writ of Habeas Corpus.*¹

DENTISTRY—LICENSE TO PRACTICE—CONSTITUTIONAL LAW. The legislative power to restrict and regulate occupations which affect the public comfort and health extends to the practice of dentistry.

SAME—ARBITRARY RULES. LAWS 1901, p. 315, § 1, providing for the examination and licensing of dentists, is not unconstitutional as a delegation of legislative power to a board, by reason of the fact that the board of examiners may adopt arbitrary rules; since it will be presumed that the rules will be reasonable, and, if void or arbitrary, they may be reviewed and do not render the act void.

SAME—QUALIFICATIONS OF DENTISTS—REASONABLENESS OF REGULATIONS. LAWS 1901, p. 315, § 1, providing as qualifications of dentists, that the applicant for a license to practice shall be possessed of a diploma from a dental college in good standing, shall be of good moral character, etc., contains no unreasonable requirements.

Application to the supreme court, filed April 9, 1904, for a writ of habeas corpus. Writ denied.

John R. Parker and *E. J. Brown*, for petitioner.

Fremont Campbell, *Charles O. Bates* and *Walter M. Harvey* (*Samuel R. Stern*, of counsel), for respondent.

MOUNT, J.—Application for a writ of habeas corpus. Petitioner was convicted of the crime of practicing dentistry without having first obtained a certificate authorizing him to practice dentistry within the state. He prosecutes this writ, claiming that the dental act, under which he was convicted, is unconstitutional, because, (1) it is in derogation of his personal rights; (2) it has attempted to delegate arbitrary legislative power to the board of

¹Reported in 78 Pac. 899.

36	377
387	99
37	107
37	109
387	111
137	69
36	377
139	709
36	377
42	242

dental examiners; and (3) because the act provides that no applicant shall be eligible to take an examination before said board unless he has a diploma from a dental college. We shall consider these questions in the order stated.

(1) The right to pursue a lawful occupation is, of course, conceded, but there are certain occupations, in themselves lawful, which are subject to legislative restriction and regulation for the preservation of comfort, health, and life. It is now generally, if not universally, held that the practice of dentistry is one of the occupations reasonably falling within the legislative right of regulation. This court recently so held in *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110, which was a case involving the constitutionality of the act in question in this case.

(2) The act, in so far as it is subject to attack upon the other points, is as follows:

"§ 4. Any person or persons seeking to practice dentistry within the state of Washington, or to own, operate or cause to be operated, or to run or manage a dental office or place for the practice of dentistry in the state of Washington after the passage of this act, shall file his or her name, together with an application for examination, with the secretary of the state board of dental examiners, and at the time of making such application shall pay to the secretary of the board a fee of \$25, and present him or herself at the first regular meeting thereafter of said board to undergo examination before that body. No person shall be eligible for such an examination unless he or she shall be of good moral character and shall present to said board his or her diploma from some dental college in good standing and give satisfactory evidence of his or her rightful possession of the same. . . . All persons successfully passing such examination shall be registered as licensed dentists in

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the board register as hereinafter provided, and also receive a certificate, said certificate to be signed by the president and secretary of said board . . .” Laws 1901, p. 315.

The dental board is authorized by this act to examine all applicants for certificates. To be eligible to this examination, the applicant must possess a good moral character, and present a diploma from some dental college in good standing, and give evidence of the lawful possession of such diploma. No power of legislation is conferred by the act upon the dental board, unless it may be said that the rules which the board have adopted, or may adopt, are arbitrary and unauthorized. There is nothing in the record before us to indicate that the dental board have adopted any rules, arbitrary or otherwise, but assuming that the board have adopted some rules—as they certainly must, in order to properly determine the good character of the applicant and the good standing of the college issuing his diploma, and to conduct the examinations upon subjects reasonably required in that profession—we must assume in this proceeding that such rules are reasonable and within the scope and purview of the act. That the board may adopt unreasonable, unwarranted, or purely arbitrary rules for the examination of applicants cannot be presumed to defeat the act. Unless the act itself is void, arbitrary or void rules, made without authority of the act, cannot render it so. The remedy of petitioner for an abuse of the powers of the dental board is not an attack upon the act creating the board, but must be found in some appropriate proceeding to review the conduct of the board.

In the case of *Ex parte Whitley*, decided by the supreme court of California in July of this year, and reported in 77 Pac. 879, that court, in speaking to this point, said:

"Upon the other point, that the power conferred on the board is of such a character as, if exercised arbitrarily, it will be beyond the power of the court to control it, it may be said that petitioner does not seem to have applied to the court on any complaint that the board has taken such arbitrary action. He has not complained to any court that the board has unjustly and arbitrarily dealt with him, but he is here contending that the law is unconstitutional, and that, under it, his right to practice is not subject to action or determination by the board at all. If he has been unjustly and arbitrarily dealt with, and should apply to the courts for redress, it will be doubtless found, as is stated in *Dent v. West Virginia*, 129 U. S. 124, 9 Sup. Ct. 234, 32 L. Ed. 623, where the same objection was raised as to power conferred on the board of medical examiners of West Virginia, that 'if, in the proceedings under the statute, there should be any unfair or unjust action upon the part of the board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the state.' *Reetz v. Michigan*, 188 U. S. 505, 23 Sup. Ct. 390, 47 L. Ed. 563; *Wisconsin v. Chittenden*, 112 Wis. 558."

The case of *Ex parte Whitley*, *supra*, is directly in point in this case, and discusses and decides every point presented here by petitioner adversely to his contention.

(3) If we are correct in our conclusion that the legislature, in the exercise of its police power, has authority, under the state and federal constitutions, to regulate the practice of dentistry within the state by reasonable rules, it follows that the legislature may provide that an applicant must be possessed of a diploma from some dental college in good standing. There is nothing unreasonable in this requirement, nor in the other requirements named in the act. Such diploma is evidence of the ability of the applicant to practice dentistry. It is not conclusive of such ability, and the dental board may, therefore, provide reasonable rules for determining the actual ability

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of the applicant. *Ex parte Whiteley, supra*, and cases there cited.

We therefore conclude that the act is not violative of any constitutional provision suggested. The writ is therefore denied.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

(No. 5109. Decided December 28, 1904.)

THE STATE OF WASHINGTON, *on the Relation of the*
Attorney General, Plaintiff, v. THE SUPERIOR COURT
FOR CHELAN COUNTY *et al., Defendants*.¹

EMINENT DOMAIN—STATE LANDS—CONDEMNATION OF SCHOOL LANDS BY WATER COMPANY. There is no authority in this state for the condemnation of state school lands by a water company for the purpose of procuring water for domestic purposes, since the statutes do not expressly so provide, and they must be strictly construed.

Certiorari, issued upon the application of the Attorney General, to review a judgment of the superior court for Chelan county, Martin, J., entered March 17, 1904, appropriating certain state school lands, after overruling a demurrer to the petition and a motion to dismiss the proceeding for want of jurisdiction. Reversed.

The Attorney General and Vaughn Tanner, for plaintiff.

Fred Reeves, for defendants.

HADLEY, J.—Application was made here for a writ of review for the purpose of reviewing the action of the lower court in a condemnation proceeding. Upon issu-

¹Report in 78 Pac. 1011.

ance of the writ the record was certified to this court, and a hearing was had. The application was made by the state on the relation of the attorney general. The trial court entered an order adjudging that the petitioner below, the Home Water Company, a corporation, is entitled to condemn certain lands in Chelan county, the same being common school lands and belonging to the state. The alleged purpose of the condemnation is that of "procuring water for household and domestic purposes, and also for a reservoir site."

The first contention urged by the attorney general is that there is no law authorizing the condemnation of common school lands for such a purpose as stated above. Our attention is directed to the history of legislation in this state upon the subject of the power of corporations to condemn. In 1873 the legislature of the territory passed an act entitled, "An act to provide for the formation of corporations." Laws 1873, p. 398. The act repealed all former laws upon the subject. It was subdivided into four chapters. The third chapter is prefaced by the following words: "Corporations when authorized to appropriate land for corporate purposes." We fail to find in said chapter any expression that directly, or by implication, confers power upon corporations to condemn lands belonging to the state. It is true, the first section states that corporations organized for certain purposes "shall have a right to enter upon any land between the termini thereof, etc." The following remark made by this court in *Seattle & Montana R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217, is pertinent:

"As well might it be contended that because a railroad is authorized to enter upon and condemn 'any' land for its tracks, depots, shops, round houses, etc., it could, by

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serving notice upon the auditor of Thurston county, take the entire ten acres upon which the state capitol stands for a depot and shops."

The entire context of the chapter shows that the legislature was considering lands of private ownership, and also the right to appropriate portions of public highways or public grounds. The term "public grounds" cannot be said to comprehend common school lands, but rather tracts that are used and occupied for some public purpose. The act of 1873 conferred no authority to condemn any lands except upon corporations organized for the construction of "any railroad, macadamized road, plank road, clay road, canal, or bridge." It will thus be seen that the purposes of the condemnation, in the case at bar, as stated above, are not comprehended in the act of 1873, even as relates to private property. The legislature of 1879, however, passed an act amendatory of that of 1873. See, Laws 1879, p. 134. The first section of the act is as follows:

"That all corporations, authorized to do business in the territory, and who have been or may hereafter be organized for the purpose of erecting and maintaining flumes or aqueducts to convey water for consumption or for mining, irrigation, milling or other industrial purposes, shall have the same right to appropriate lands for necessary corporate purposes, and under the same regulations and instructions as are provided for other corporations in the act to which this is amendatory, and such corporations organized for such purposes, in order to carry out the object of their incorporation, are authorized to take and use any water not otherwise legally appropriated or legally claimed."

That section appears to confer power to appropriate lands for such corporate purposes as are sought to be accomplished here. It will be noticed, however, that the new statute does not enlarge upon that of 1873 as to what

lands may be appropriated. It is argued by the state that the said act of 1879 is unconstitutional and void for the alleged reason that its title is insufficient to include the subject of eminent domain. We do not find it necessary to pass upon that subject, for the reason, as we have seen, that the act does not attempt to confer power to condemn school lands. The next legislation to which our attention is directed is that of an act passed in 1890, regulating the procedure in condemnation cases and superseding all former laws upon the subject. Laws 1890, p. 294. The avowed purpose of the act, as expressed in its title, is simply to regulate the mode of procedure. The first section describes how the proceeding shall be initiated by petition, and the second section treats of the subject of notice, and how it shall be served. In the latter section appears the following:

"In case the land, real estate, premises or other property sought to be appropriated is state, school or county land, the notice shall be served on the auditor of the county in which the land, real estate, premises or other property sought to be appropriated is situated."

From the fact that the words "state, school or county land" are used as above quoted, it is argued here that the power to condemn such lands exists, and is applicable to the subject matter of this case. At the time of the passage of this act there was no law authorizing the condemnation of school lands; at least, our attention has not been called to any such statute. If the power to condemn exists in the said statute of 1890, it is discoverable by implication only. In using the words, the legislature was speaking of the manner of serving the notice in condemnation cases, and the words were clearly intended to apply only to cases where the power to condemn should be created by other independent acts. That the legisla-

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ture did not intend to confer the power to condemn school lands by the act of 1890 is accentuated by the fact that, in 1895, it did expressly declare that such lands may be appropriated by corporations organized for the construction of "any railway, macadamized road, plank road, clay road, canal, or bridge." Laws 1895, p. 146, § 1. If such power had resided in the act of 1890, there was no necessity for the act of 1895, and the legislative construction is to the effect that the power did not exist prior to 1895. It will be observed, however, that the act of 1895 cannot be said to comprehend the power of corporations to condemn for the purpose of procuring and transmitting water for household and domestic purposes and for reservoir sites. Condemnation statutes, overriding, as they do, the high right of private property, and being in derogation of common right, must be strictly construed. *Alabama Great So. Rd. v. Gilbert*, 71 Ga. 591; *Chicago etc. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Spofford v. Bucksport etc. R. Co.*, 66 Me. 26; *Binney's Case*, 2 Bland's Ch. (Md.), 95; *Belcher Sugar Ref. Co. v. St. Louis Grain Elev. Co.*, 82 Mo. 121; *Matter of Water Com'rs of Amsterdam*, 96 N. Y. 351; *Miami Coal Co. v. Wigton*, 19 Ohio St. 560. Since the rule prevails that condemnation statutes must be strictly construed, as far as they relate to the taking of private property, it follows, with even more force, that the same rule must apply where the lands of the sovereign are sought to be taken. In *Hollister v. State* (Idaho), 71 Pac. 541, the court well said:

"That a people in their collective capacity, exercising the rights, privileges, duties and obligations of sovereignty, cannot be sued except by their consent is a principle too well established to require discussion."

The authority to condemn state lands was under consideration in that case, and the court made it plain that, without clear statutory authority for such condemnation, the power does not exist, but found that a statute in Idaho expressly conferred the power, as applicable to the case then in hand. We conclude that no power is found in our statutes for the condemnation of school lands of the state, to be subjected to the purposes of the petitioning corporation in this case.

The state also argues, extensively, that condemnation should be denied for the reason that the use sought to be made of the land is not a public one, within the doctrine of *Morris v. Healy Lumber Co.*, 33 Wash. 451, 74 Pac. 662. In view of the fact that this corporation has not the power, in any event, to condemn the lands sought, it becomes unnecessary to discuss the question as to whether the use sought to be made of the lands is a private or public one.

The cause is remanded with instructions to the trial court to vacate the order of condemnation, sustain the demurrer to the petition, and grant the motion to dismiss the proceeding.

FULLERTON, C. J. and DUNBAR, ANDERS, and MOUNT, JJ., concur.

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Statement of Case.

(No. 5054. Decided December 28, 1904.)

OSCAR ANDERSON, *Appellant*, v. SEATTLE-TACOMA INTER-
URBAN RAILWAY COMPANY, *Respondent*.¹

RAILROADS—DANGEROUS PREMISES—RIGHT OF WAY—NEGLIGENCE—INJURY TO EJECTED PASSENGER ON RIGHT OF WAY—TRESPASSER. Where a passenger is wrongfully ejected from a train four miles from the city, he is not a trespasser in walking back to town on the right of way, and he does not assume the unusual risk of danger of contact with an unprotected electrically charged third rail, of which he was not warned and had no notice.

SAME—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. In an action for personal injuries sustained by a passenger after being wrongfully ejected from a train, by reason of coming in contact with an electrically charged "third" rail while he was walking back along the right of way, the negligence of the railroad company, and contributory negligence of the plaintiff, is for the jury, and it is error to direct a non-suit, where it appears that the power was carried in an electrically charged unprotected third rail, laid along the ground, and having the appearance of an ordinary rail, that plaintiff was ejected at night at a station four miles from the city, without any notice or warning of the danger, that the road had been open for travel only about one week, and plaintiff did not know that the rail was electrically charged or dangerous, and did not see the warning signs posted at the station, on account of the darkness, and was unfamiliar with the highways in the locality, and his business required an immediate return.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 15, 1903, upon granting a motion for a nonsuit, at a trial before the court and a jury, dismissing an action for personal injuries sustained by a passenger, after ejection from a train, through coming in contact with an electrically charged third rail upon the right of way. Reversed.

¹Reported in 78 Pac. 1013.

James M. Epler, for appellant.

Piles, Donworth & Howe, for respondent. The appellant was a trespasser in walking back upon the track. *Hargreaves v. Deacon*, 25 Mich. 1; *Kelley v. Michigan Cent. R. Co.*, 65 Mich. 186, 31 N. W. 904, 8 Am. St. 876; *McCaughna v. Owosso etc. Elect. Co.*, 129 Mich. 407, 89 N. W. 73, 95 Am. St. 441; *Matson v. Port Townsend etc. R. Co.*, 9 Wash. 449, 37 Pac. 705; *Anderson v. Northern Pac. R. Co.*, 19 Wash. 340, 53 Pac. 345. A trespasser acquires no rights by his trespass. Bishop, Non-Contract Law, § 845; Cooley, Torts (2nd ed.), p. 792; Fetter, Carriers of Passengers, § 236; 7 Rapalje & Mack's Digest of Railway Law, pp. 1126-1128. It was his duty to leave the track at the public roads at the station. *Ham v. Delaware etc. Canal Co.*, 142 Pa. St. 617, 21 Atl. 1012; *Benson v. Central Pac. R. Co.* 98 Cal. 45, 32 Pac. 809; *Ham v. Delaware etc. Canal Co.*, 155 Pa. St. 548, 26 Atl. 757, 20 L. R. A. 682. He can not recover in this action upon his contract of carriage. *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334; *Price Baking Powder Co. v. Rinear*, 17 Wash. 95, 49 Pac. 223; *Cox v. Richmond etc. R. Co.*, 87 Ga. 747, 13 S. E. 827; *Parmelee v. Savannah etc. R. Co.*, 78 Ga. 239, 2 S. E. 686; *Bolton v. Georgia Pac. R. Co.*, 83 Ga. 659, 10 S. E. 352; *Gas-Light Co. v. Rome etc. R. Co.*, 5 N. Y. Supp. 459. The appellant was not accepted as a passenger on this train and the company did not become responsible to him. *Stevenson v. West Seattle etc. Co.*, 22 Wash. 84, 60 Pac. 51; *Merrill v. Eastern R. Co.*, 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705; *Webster v. Fitchburg R. Co.* 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *Georgia Pac. R. Co. v. Robinson*, 68 Miss. 643, 10 South. 60; *Jones v. Boston etc. R. Co.*, 163 Mass. 245, 39 N. E. 1019; *Haase v. Oregon R. &*

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Nav. Co., 19 Ore. 354, 24 Pac. 238; *Schaefer v. St. Louis etc. R. Co.*, 128 Mo. 64, 30 S. W. 331; *Schepers v. Union Depot R. Co.*, 126 Mo. 665, 29 S. W. 712.

HADLEY, J.—This is an action to recover damages for personal injuries received by the appellant and alleged to have been caused by the negligence of the respondent. The respondent is the owner and operator of an electric railroad between the cities of Seattle and Tacoma. The appellant's complaint alleges that, on the 5th day of October, 1902, he was a passenger on a car of the respondent going from Tacoma to Seattle, and was riding on a ticket purchased by him at Seattle from an agent of respondent, which ticket entitled him to ride on respondent's cars from Seattle to Tacoma and return; that he was on a car of respondent, riding on said ticket, when the car reached a point about four miles from Tacoma in the direction of Seattle; that the cars were stopped at said point, and one of the men in charge—either the motorman or conductor—twice requested appellant, in a manner amounting to a command, to get off the car; that he did get off, and the car at once started, leaving appellant standing beside the track at a station the name of which is unknown to him; that, upon being forced to get off the car, he at once started back toward Tacoma, and walked on the ties of the railroad bed; that he had proceeded about a mile, to a point where the road bed is upon an embankment, elevated some five or six feet, the embankment being quite steep, at which place he saw a bridge a short distance ahead; that, for fear of some accident, he tried to get off the road bed and down the embankment, and, in his efforts to descend, he reached out his hand and took hold of one of the rails placed and used by respondent on its track, when he received a

terrible electric shock; that the shock was so severe that it rendered him unconscious, threw him prostrate upon the ground, where he lay in an insensible condition for three-quarters of an hour, and, on recovering consciousness, he found he could not use his left hand, arm, or leg, they seeming to be paralyzed; that he was injured about 6:30 P. M., and, after recovering consciousness, he dragged himself along by the aid of his uninjured leg until he reached a hotel in Tacoma, about 1 o'clock A. M.; that respondent company had left said rail so charged with electricity in an exposed position, with no covering over it, and with nothing to protect any one who should touch it from receiving the full force of the electric charge borne by the rail; that in so doing respondent was guilty of negligence, and that by reason of such negligence appellant was injured without fault on his part. The nature and continuing effect of the injuries are also set forth in detail. The answer is a general denial of the material averments of the complaint, and it also affirmatively alleges contributory negligence. A trial was had before the court and a jury. At the conclusion of the plaintiff's evidence, the respondent challenged the sufficiency of the evidence to sustain a verdict in behalf of plaintiff, and moved the court to take the case from the jury, and enter judgment in favor of the defendant, as provided by statute. The motion was granted by the court, and judgment was entered dismissing the action, at plaintiff's costs. The plaintiff has appealed.

The evidence shows that appellant had bought a round trip ticket for passage over respondent's road from Seattle to Tacoma and return. He had made the trip from Seattle to Tacoma in the afternoon of the day the accident happened. After spending some time in Tacoma, and

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at about 6 o'clock in the evening, he attempted to get upon one of respondent's cars for the return trip to Seattle. The car was then on Pacific avenue in Tacoma. He approached it from the left side, and just as it was starting he stepped upon the front step. The front door upon that side was closed, and appellant says he thought they were going to open it and let him in, but they did not do so. There is evidence to the effect that, when these cars were afterwards flagged across the Northern Pacific railroad tracks in Tacoma, the appellant had sufficient time to go around the car, and get into it from the other side. But it also appears from the evidence that he did step off at said place, and that the car started again almost immediately, when he stepped back where he had been standing. Whether there was sufficient time for appellant to have gone around the car and entered it from the right side or not, he in any event did not do so, and remained upon the left front step until the car reached the first station out of Tacoma. Upon reaching this station the motorman opened the door and told appellant he must get off the car. Appellant stepped with one foot on to the station platform, and the car started immediately. He then jumped back upon the car step, and the car was again stopped, when he was forced to get off. When he was told he must get off he said, "I have got a ticket to go to Seattle. Give me time to get around on the other side and get on the car." But no time was given, and the car immediately moved away. Being thus left, and believing that his business required his return home that night, appellant immediately started back toward Tacoma for the purpose of trying to get a boat for Seattle. By this time darkness had come on, and appellant, being a stranger to the surroundings, and unacquainted with the topography and highways of the

locality, started to walk upon the railroad track, with the result stated in his complaint.

The trial court, when ruling upon the motion for nonsuit, stated, as shown by the record:

"I do not think there is any doubt but what the evidence shows that the defendant neglected its duty to the plaintiff, in not either permitting him to go in the car from the front door where he was hanging on the outside, or giving him sufficient time to get around to the other side of the train where he could get in where it was open."

The court further stated that he believed appellant would have a cause of action against respondent for wrongfully leaving him at the station, but that he was guilty of negligence when he started to walk on the railroad track and is not entitled to recover for his injuries. The appellant, however, bases his right to recover upon the theory that respondent negligently put him off the car on the right of way, when that right of way was in an unsafe condition, and without giving him any notice or warning of the danger. He testified that he did not know of the existence of the electrically charged rail, and there is no evidence to the contrary. This accident occurred on the first Sunday after the road was opened for travel. There is evidence that the newspapers had mentioned the matter of this third rail, but it does not appear that appellant knew about it. The evidence shows that neither the motorman nor the conductor, nor any one else, notified him, or warned him, of the danger, when he was put off the car. It must, therefore, be assumed, for the purposes of this discussion, that he was in absolute ignorance of the presence of danger from such a source. It appears that a notice was posted at the station calling attention to this dangerous rail, but in the darkness appellant did not see it, and knew nothing of it. There were some elec-

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tric lights at the station, but he did not see the notice, and started to walk upon the track in entire ignorance of the presence of any danger not ordinarily to be expected when walking upon a railway track. The respondent claims that, having fenced its right of way, and posted the notices as to danger, it thereby discharged its duty in the way of securing the public, and was entitled to use upon its own premises such devices as it chose to operate. It is, therefore, claimed that appellant was a trespasser upon respondent's premises at the time he was injured, and for that reason cannot recover.

It cannot be said that appellant's presence upon respondent's premises was initiated by trespass. He had, by contract and for a consideration, first entered upon the premises, and had been carried as a passenger from Seattle to Tacoma. The same contract called for his transportation from Tacoma to Seattle; and he therefore not only had a right to be upon the premises, but was there by the invitation and consent of respondent. The conduct of respondent's agents and employees, in forcing him to leave the car, is unexplainable in the light of the evidence in the record. Certainly the demand for speed in modern travel does not call for such zeal on the part of the employees of a railway company that time shall not be given a passenger to get aboard when he has already paid his money, in the usual manner, for his transportation. The fact remains in this instance, however, as appears from the record, that just that thing occurred, and appellant was forced to step from the car upon respondent's right of way. He was, therefore, not a trespasser *ab initio*, and certainly not one up to the time he was left, in the night time, at a strange place upon respondent's premises. Being thus left upon the premises

where he had a right to be, did he thereafter become a trespasser?

It is true, he was left at a station surrounded by farm houses, but that was only part of the premises to which he had been invited by respondent, when it accepted his money and agreed to carry him as a passenger. He had the right to pass over the entire right of way in respondent's cars, but that right had been denied him. When he was left by respondent, he was not directed to leave its premises, but was merely forced from its cars, and deposited upon its right of way. He was not informed how, in the night time, he could find his way over the ordinary highways. Being thus left upon the premises, under all these circumstances, did he have no rights greater than those of an ordinary trespasser, when he moved along respondent's track? It is true he was not invited upon the premises as a pedestrian, but he was invited to come for business purposes, and we believe, under all the conditions, that he did not become a trespasser in the really tortious sense of that term, even though some elements of technical trespass may have been present. He was, in any event, entitled to the reasonable protection from injury which one human being owes to another when placed in like situation. Respondent's agents must have known that, from common experience, the thing appellant was most apt to do was to take the track back to Tacoma. They should, therefore, have seen that he was advised of the danger of such a course because of the unusual and imperceivable danger to an uninformed traveler. Doubtless he was required to take the risk of all ordinary dangers attending a pedestrian upon a railway track, such as contact with moving trains, falling through bridges, and other usual dangers. But since he came upon respond-

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ent's premises rightfully, and did not come as a wilful trespasser, we think he was not required to take the risk of such an unusual and hidden danger as this third rail. Its character was unknown to him, and its powerful, death-dealing force was entirely concealed.

"The great force that was being carried over the wires gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact." *Clements v. Louisiana Electric Light Co.*, 44 La. An. 692, 11 South. 51, 32 Am. St. 348, 16 L. R. A. 43, 4 Am. Elec. Cases, 381, 386.

In the case at bar, however, the dangerous agency was not a wire which, when strung upon insulators, may ordinarily be supposed to be charged with electricity, but it was a common rail, bearing only the appearance of an ordinary rail of a railway track, and disclosing no connective relations which would render it more dangerous than an ordinary piece of iron. If modern transportation methods involve the use of such concealed, unprotected, dangerous, and deadly devices where persons of common experience may be expected to come in contact with them, we believe those who use them should not escape liability unless they exercise such a degree of care to warn and protect those who are injured as the circumstances and surroundings reasonably require. Whether such care is exercised in a given case, becomes a question of fact for the jury. In a case of this kind, the conditions are out of the ordinary and call for care commensurate therewith. To the uninformed, the danger in this rail was as completely hidden as is the danger in the case of a spring gun. It is true, spring guns are usually set for the express purpose of

inflicting injury or taking life, while this rail was placed without such intention, but to be applied to the useful purposes of commerce and transportation. To one ignorant of the presence of the danger, however, injury follows alike as the result of coming in contact with either device. This court has held that death to an absolute trespasser from the discharge of a spring gun, not set to kill any particular person, makes the one who sets it guilty of murder in the second degree. *State v. Barr*, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. 890, 29 L. R. A. 154. While the absence of criminal intent may remove this case from the domain of crime, yet resultant damage from neglect to sufficiently guard and warn against what is, in itself, an entirely concealed death trap is, in effect, the same as that visited by the spring gun, and is certainly ground for recovery of damages. Whether such neglect exists in this case is for the jury to say, and the same is also true as to whether appellant was guilty of contributory negligence.

The general principle applying to those who go upon premises of another by invitation or inducement for business purposes is well expressed in *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216, as follows:

"The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of."

The above statement of principle exactly covers the relations of respondent and appellant at the time and place the latter was put off the car. If he had, at that place, come in contact with this hidden danger, the stated prin-

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ciple would have completely covered this case without leaving room for argument. The concealed danger was not, however, at that immediate point, but first appeared just outside the station grounds, a few feet away. Unless a radical change of relationship occurred the moment appellant crossed the line between the station grounds and the unprotected third rail, then it did not occur at all. For reasons already stated, we think, as he was not a trespasser in the beginning, he did not become a real trespasser at all, but was on respondent's premises by inducement for business purposes, and being left as he was under the peculiar circumstances, he was not required to measure with exactness any given number of square feet of respondent's right of way which he might occupy and at the same time feel secure from hidden and unusual dangers, unless he had been warned of the danger. We therefore think the authority quoted is applicable to appellant's situation at the time he was injured. The same principle is sustained in the following cases: *Bennett v. Railroad Co.*, 102 U. S. 577; *Nickerson v. Tirrell*, 127 Mass. 236; *Davis v. Central Cong. Soc.*, 129 Mass. 367, 37 Am. Rep. 368; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175; *Camp v. Wood*, 76 N. Y. 92, 32 Am. Rep. 282; *Hayward v. Merrill*, 94 Ill. 349, 34 Am. Rep. 229; *Hartwig v. Chicago etc. R. Co.*, 49 Wis. 358, 5 N. W. 865.

Respondent cites a number of cases where the relationship in the beginning was that of trespasser, and so continued until the time of the injury. Such, as we have seen, was not true here. In *Ham v. Delaware etc. Canal Co.*, 155 Pa. St. 548, 26 Atl. 757, 20 L. R. A. 682, cited by respondent, a passenger was wrongfully ejected from a train, and was afterwards killed while walking upon the track. The standard set in that case was that the

deceased should have left the track "at the earliest practicable opportunity that a reasonably prudent man would have discovered and seized, and that the plaintiff had the burden of proof that he did so." The question was left to the jury. The same case is also cited by respondent as reported in 142 Pa. St. 617, 21 Atl. 1012, in which the court uses the language that nothing short of "imperious necessity" would have excused the deceased in continuing on the track, but the opinion on the second appeal clearly established the rule above stated as to prudence and care, and left it for the jury to decide the fact in that regard. *Benson v. Central Pac. R. Co.*, 98 Cal. 45, 32 Pac. 809, also cited by respondent, was a case where a six-year old child was carried with her father beyond her station. She and the father walked back upon the railroad track and the child was struck by a train. Recovery was denied. The accident happened in broad daylight, and, as we have already intimated, one walking upon a railway track under such circumstances, although not a trespasser from the beginning, must, in the absence of wanton negligence on the part of the railway company, take the risk of such ordinary dangers as the running of trains, but that a different rule should apply where a concealed deadly agency is strung continuously along the track, and of which the pedestrian has received no notice. *Webster v. Fitchburg R. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521, was a case where a person in possession of a ticket, while running across the company's tracks outside the passenger station, apparently to catch a train about to start, was struck and killed by another train. Recovery was denied on the theory that he had not yet become a passenger. In any event, whether he was such or not, he was required to look out for such known dangers as running trains when

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he was upon the tracks. The facts of other cases cited by respondent we believe do not bear sufficient analogy to the facts of this case to make a discussion of them profitable here.

For these reasons, we think the questions of negligence and contributory negligence, under the evidence as introduced, were for the jury, under proper instructions. We therefore think the court erred in withdrawing the case from the jury. The judgment is reversed, and the cause remanded with instructions to proceed with a new trial.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ., concur.

(No. 4344. Decided December 29, 1904.)

WESTLAND PUBLISHING COMPANY, *Appellant*, v. M. G. ROYAL *et al.*, as *Directors of School District No. 1, of Thurston County, Respondents and Appellants*, and DAVID LINCOLN, *Intervenor and Appellant*.¹

36	399
36	422
36	437
36	430
36	435
36	436
36	692
36	694
36	399
40	562
36	399
41	274

APPEAL—DISMISSAL—BOND—FORM AND SUFFICIENCY. Where the bond on appeal runs to the State of Washington, instead of to the adverse party, as required by Bal. Code, § 6505, but obligates the appellant to pay all costs etc. awarded against it, and the intent is manifest to execute it for the benefit of the respondents, the appeal will not be dismissed, especially in view of Laws, 1899, p. 79, providing that appeals shall not be dismissed for defects in the bond, if upon order the party perfect the appeal.

SCHOOLS—STATE BOARD OF EDUCATION—UNIFORM SYSTEM OF TEXT BOOKS. Under Laws, 1897, p. 356, the state board of education has the exclusive power to adopt a uniform series of text books and prepare a general course of study for the public schools.

SAME—COURSE OF STUDY INCONSISTENT WITH STATE COURSE. Where the course of study prescribed by the state board of

¹Reported in 78 Pac. 1096.

education for public schools under § 27 of the school code, requires the use of certain text books and writing tablets in certain specified grades, a course of study prescribed by the directors of a school district, requiring such text books to be supplemented by the use of others on the same subject, is inconsistent with the law of the state, and is not authorized by § 73 of the school code giving such directors the power to grade the schools, nor by the fact that §§ 73 and 27 are apparently repugnant.

SAME—REMEDY FOR FAILURE OF DISTRICT TO FOLLOW STATE COURSE OF STUDY—INJUNCTION—MATERIAL DAMAGES. Where a school district refuses to follow the course of study adopted by the state board of education, the publisher of the books (under contract with the state board) is not entitled to relief by injunction unless materially damaged, and an injunction will not be issued because one teacher testified that more of plaintiff's writing tablets would have been used if they had not been supplemented by other copy books, when it does not appear how many more would have been used, and when the tablets were used in all the grades prescribed, and one more.

SAME—FOLLOWING STATE COURSE OF STUDY—GRADING SCHOOLS—DIFFERENT CLASSES IN SAME YEAR. Where the directors of a school district divided the sixth year into two classes, A and B, the latter being promoted into the former after the first half of the year, the requirement by the school district that the text book prescribed by the state board of education for the sixth grade be used in class A only, is not a violation of the rights of the publisher, since the state course does not contemplate the use of the publication at all times during the year, especially where it appears that it is used until the pupils become proficient therein, and since no damage is shown where it does not appear that there were any pupils in the sixth grade who did not purchase and use the book during the year.

SCHOOL DISTRICTS—CLASS OF—NUMBER OF TEACHERS EMPLOYED—PLEADING AND PROOF—AMENDMENT. A finding that a school district is of the class employing more than one teacher is supported by the evidence where three teachers of the district testify, and the pleadings may be considered amended to bring the same within the issue determined.

INTERVENTION—PARTIES INTERESTED IN LITIGATION—PATRON OF SCHOOL INTERVENING IN SUIT AGAINST DISTRICT BROUGHT BY PUBLISHER OF TEXT BOOKS. A taxpayer in a school district whose

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children attend the school has no such interest in the matter in litigation as entitles him to intervene in an action brought against the district by the publisher of text books under a contract with the state board, which action is based on the publisher's contract to supply the books needed and seeks to enjoin the school district from deviating from the course of study prescribed by the state board of education.

Cross-appeals from a judgment of the superior court for Thurston county, Linn, J., entered June 5, 1902, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action for an injunction. Affirmed. Also, an appeal from an order denying a petition for leave to intervene, entered February 17, 1902. Affirmed.

Vance & Mitchell and *Ballinger, Ronald & Battle*, for appellant.

J. B. Allen, C. D. King, M. G. Royal, and Troy & Falknor, for respondents.

J. B. Allen and *Troy & Falknor*, for appellant intervenor.

PER CURIAM.—This action was instituted by the plaintiff to enjoin the defendants, as the board of directors of school district No. 1, of Thurston county, from using certain books and publications, during specified times, in the common schools of the city of Olympia, and to compel them to use exclusively, during the time mentioned, a text book "Why We Vote," and "St. John's Analytic Writing Tablets," published by plaintiff, and furnished for use in the schools throughout the state under an alleged contract with the state board of education. The complaint alleges, that the plaintiff is a corporation, duly organized and existing under the laws of the state of Washington, and duly empowered to do

business therein, and, as such corporation, is engaged in the publication of school and text books, and is the publisher of "St. John's Writing Tablets," and "Why We Vote," a text book on civics; that each of the defendants is a duly elected and qualified member of the board of directors of school district No. 1, of Thurston county, a municipal corporation existing under the laws of this state, and together constitute the board of directors of said district; that said school district does not embrace within its limits a city containing ten thousand or more inhabitants; that on the — day of —, 1900, in accordance with the laws of the state of Washington, the state board of education, being duly authorized thereto, did adopt a list and series of text books for use in the public schools of the state of Washington, and prescribed a course of study in said schools, and subsequently did enter into certain contracts, at the times and dates, and upon the terms, thereafter mentioned, for the furnishing of said text books in said schools, such action and such contracts being for the use and benefit of the state of Washington according to the laws and constitution thereof, the list and series so adopted being thereto attached, marked "Exhibit A," and made a part of this complaint; that upon the 14th day of May, 1900, the state of Washington, through its duly authorized agents, the state board of education, did enter into the contracts above alluded to with the plaintiff, adopting for use, in the schools of the state of Washington, certain text books and publications published by the plaintiff, and for the furnishing of the same by plaintiff for the term of five years, beginning September 1, 1900, and ending on September 1, 1905, the terms and conditions of said contracts (omitting prices of publications stated) being as follows:

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"This contract, made and entered into this fourteenth day of May, 1900, between the state board of education of the state of Washington, party of the first part, and Westland Publishing Company of Olympia, a corporation organized and operating under the laws of the state of Washington, party of the second part, witnesseth: That the aforesaid party of the second part has made a proposition to supply to the people of the state of Washington certain text books, a copy of which proposition is hereto attached and made a part of this contract; and in consideration of the terms set forth in said proposition, and of the terms of this contract, the state board of education of the state of Washington, party of the first part, hereby adopts the following named books to be used in the public schools of the state of Washington, for a period of five years from and after September 1st, 1900: Elementary Civics, 'Why We Vote,' St. John's Writing Tablets, for the grammar grades. That for and in consideration of the adoption of the books hereinbefore mentioned, the said party of the second part hereby agrees to furnish said books in sufficient quantities for the use of the common schools of Washington for the full term of five years, as aforesaid, at the following exchange, wholesale and retail prices, in accordance with the law governing the same [stating them]. And the said party of the second part agrees to maintain the present or superior style and quality of scholarship, material, illustrations and general mechanical excellencies of the aforesaid book as shown by sample submitted to said board of education, party of the first part. And the party of the second part hereby promises and agrees that the books above named shall be of the kind and quality set forth in their proposal and this contract, and the prices of said books shall be as hereinbefore specified, and that this contract shall be null and void at the option of the party of the first part if the party of the second part fail to comply with all the terms hereof; Provided, a reasonable notice shall be given to the party of the second part by the party of the first part, together with a reasonable opportunity wherein to fulfill the terms of this agreement." (Signed, etc.)

It is also alleged, that said contract was duly approved by the proper officers of the state, and that a bond, as required by law, was executed, approved, and filed with the proper custodian; that the said course of study prescribed by the state board of education directed and required the said books to be used in schools such as are embraced in and a part of school district No. 1, of Thurston county, in the following grades: St. John's Writing Tablets, in classes A and B throughout the fifth, sixth, seventh, and eighth years of the course of study as prescribed; and "Why We Vote," in classes A and B and throughout the entire sixth year of the prescribed course; that the said adoption, contract, and prescribed course of study required the use of said books during the entire life of said contract, in the manner prescribed by the proper authorities, and that said contract is in good standing, and has been complied with in all respects by the plaintiff; that under the laws of the state, it is made the duty of the directors of said school district No. 1 to enforce the requirements of the law, and to compel the use of the books above mentioned, as well as all books adopted, contracted for, and prescribed in the schools of said district; that said defendants, acting in their official capacity, have directed the teachers and employees in the school of said district to refuse to use said books in the course of study prescribed by the state board of education, and threaten to continue such unlawful direction and refusal, and will, unless enjoined by the court, fail and refuse in the future to use said books, prescribed in said course of study, and will cause the teachers and subordinate employees of said school to continue said refusal to use said books; that, in accordance with said direction, given by the defendants in their official capacity, the teachers and subordinate employees of the

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schools of said district are refusing, and will continue to refuse, said books in the course of study prescribed unless said defendants are enjoined and restrained by the court from persisting in their unlawful course and directions, and are required to use the books aforesaid, as prescribed by the proper authority; that said defendants, directors of said district, have been repeatedly requested by the plaintiff to require and enforce, in the schools of said district, the use of the said books, in the course and in the manner and at the time prescribed by the adoption, contract, and course of study; that the said defendants have been requested and instructed by the proper superior school officers of said county to use and enforce the use of said books, according to said prescribed course of study, but the defendants, in their official capacity as board of directors, have refused, and still declare that they will not use said books in the manner, at the time, and in the course prescribed.

It is further alleged, that, acting under the direction and instruction of the defendants herein, the teachers of said school district have adopted and prescribed a pretended course of study, and are attempting to enforce the pursuit of the same in the schools of said district, by which said books of plaintiff will not be used but will be supplanted; that the said board of directors threaten and intend to use other books in the future, during the lifetime of this contract, and in place and stead of the said books of plaintiff, and will discard the use of the said books altogether, unless restrained by the court, and that the employees of the said school district, acting under the illegal direction of these defendants, will discard altogether, and not use, the contract books of the plaintiff, unless the defendants are restrained as prayed and required by plaintiff; that the rights of the plaintiff under

its contract, adoption, and course of study are valuable pecuniary and contract rights; that the said contract and the law excludes the state, and all school districts such as said district No. 1, from using any book or books in place or stead of the books described in plaintiff's contract, whether the book or books attempted to be substituted for the same are used as substitutes directly or are called and denominated additional or supplementary text books.

It is next alleged, that the damage that would accrue to the plaintiff by reason of said illegal action of defendants would continue during the life of the plaintiff's contract, and may not be calculated in money, and that the injury which would result to the plaintiff is irreparable, and that the plaintiff has no remedy at law; that the said illegal action of the defendants prevents and interferes with the sale, by the plaintiff, of the books in said contract, assured to the plaintiff by the laws of the state of Washington; that the work on civics, entitled "Why We Vote," has not been used in the public schools of the state, and in the schools of said district No 1. of Thurston county, as required by law, during the entire sixth year, but only during one-half of said year, and in one class in said year; that St. John's Writing Tablets should have been used during the fifth, sixth, seventh, and eighth years, and in all the classes prescribed, but it has been used and prescribed to be used only in the fifth, sixth, and seventh years, and one-half of the eighth year; that, in addition to St. John's Writing Tablets, the defendants have used, during said years, certain other text books and tablets covering the same subject matter covered by the St. John's Writing Tablets, to the great detriment and damage of plaintiff, and that the officers of said school district have no right,

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either at law or in equity, to add to or supplement the books of plaintiff, or to use other books together with the books of plaintiff, covering the same subject matter.

The defendants interposed a motion to make this complaint more definite and certain in certain particulars, which motion was by the court denied. They then demurred to the complaint on practically all the statutory grounds. The demurrer was overruled, and the defendants thereupon answered, denying each and every averment of the complaint, except that they were the qualified and acting directors of school district No. 1, of Thurston county, Washington, and setting up certain matters as affirmative defenses, the principal purpose of which seems to have been to show why plaintiff's contract and bond, mentioned and described in the complaint, were invalid, and wherein there was a defect of parties to the action. The plaintiff interposed a demurrer to the affirmative defenses, which demurrer was sustained. The defendants declined to amend further, and the cause went to trial upon the complaint and the amended answer of the defendants theretofore filed. Having duly considered the evidence adduced upon the trial, and made and filed its findings of fact and conclusions of law, the court dismissed the action, and gave judgment against the plaintiff and in favor of the defendants for their costs and disbursements. From this judgment both parties appealed.

The defendants move the court to dismiss plaintiff's appeal for the reason that no appeal bond has been given by said appellant to respondents, "the adverse party," as required by law. The appeal bond in question runs to the state of Washington, instead of to the adverse party (respondents), as prescribed by § 6505, Bal. Code, but in all other respects it strictly conforms, both in form

and substance, to § 6505 of said code. It obligates the appellant to "pay all costs and damages that may be awarded against it on said appeal or the dismissal thereof, so taken to the supreme court, not exceeding the sum of two hundred dollars." The intent and meaning of the bond is manifest; and, while the bond was not executed to the respondents, as adverse parties, it was evidently executed and filed for their benefit and protection, and, in case of an action upon it, neither the principal nor the sureties therein named would be permitted to challenge its validity. It is not the policy of our law to deprive a litigant, upon merely technical grounds, of the right to have his cause tried and determined upon its merits. The legislature has declared that, on the hearing of motions to dismiss appeals, . . . "The court shall upon like terms allow all amendments in matters of form, curative of defects in proceedings, to the end that substantial justice be secured to the parties, and no appeal shall be dismissed for any informality or defect in the notice of appeal, the appeal bond, or the service of either thereof, or for any defect of parties to the appeal, if the appellant shall forthwith, upon order of the supreme court, perfect the appeal." Laws 1899, p. 79. See, *Bloomingtondale v. Weil*, 29 Wash. 611, 70 Pac. 94. In view of the above quoted provision, as construed in the case above cited, we would not be justified in dismissing the appeal without first granting the appellant the privilege of executing and filing a more formal and perfect undertaking, even if we considered the bond already filed in the case imperfect and insufficient in substance. Believing that this bond was intended by appellant to protect the respondents from the payment of the costs of an unsuccessful appeal, and that it is sufficient for that purpose, the motion to dismiss the appeal is denied.

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Before entering upon a discussion of any of the questions raised by the appellant plaintiff, we deem it advisable to refer to the provisions of the code of public instruction (Laws 1897, p. 356), defining the powers and duties of the state board of education, the boards of directors of school districts, and the county superintendents of common schools. Section 27 of that code declares that the state board of education shall have power to adopt or readopt, according to law, at a special meeting, to be called by the superintendent of public instruction, a uniform system of text books for the use of the common schools throughout the state, and to prepare a course or courses of study for the primary, grammar, and high school departments of the common schools. Section 105 prescribes the manner in which such uniform system of text books for the use of the common schools, including graded schools, shall be adopted or readopted by the state board of education. It provides, in substance, among other things, that no books shall be adopted without a majority vote of the whole board: *Provided*, they can secure an exchange of books at any time in use for those of the same or next higher grade, without a greater average cost to the people than that specified therein; that said board shall have power to enter into contract with the publishers of the books adopted for the supply of the same, to take effect on the first day of September following; that the books so adopted shall not be changed within five years thereafter, unless the publishers of such adopted books shall fail to comply with the terms of the contracts, and that the adoption provided for shall occur every five years, at the time of the year and in the manner therein provided, unless otherwise ordered by the legislature. Section 33 of the code of public instruction declares that it shall be the duty of the county superin-

tendent of schools to enforce the course of study adopted by the state board of education. And it is provided in § 40 that it shall be the duty of boards of directors, unless otherwise specially provided by law, to enforce the course of study prescribed by the state board of education, and to require all pupils to be furnished with such books as may have been adopted by the state board of education, as a condition to membership in the schools; and § 174 provides that any district failing to comply with the course of study prescribed by the board of education shall forfeit twenty-five per cent of their school fund for that or the subsequent year, which sum the county superintendent is required to deduct from the apportionment to be made to such district. Section 73 provides that, in all such city and town districts where the number of children of school age is sufficient to require more than one teacher, the school or schools in such city or town districts shall be graded in such manner as the directors thereof shall deem best suited to the wants and conditions of such districts; provided the course of study established for such districts shall not be inconsistent with the laws of this state.

In view of the provisions of our school law above referred to, it was certainly the intention of the legislature to confer upon the state board of education the exclusive power to adopt a uniform series of text books, and to prepare a general course of study for the public schools of the state. And they also evidently intended that the books adopted by the board should be used, and the prescribed course of study pursued, in the various departments of the public schools. But it must be borne in mind that, although the state board of education is empowered to adopt text books, and to prepare a course of study for the schools, it is neither expressly nor by

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necessary implication authorized by law to grade all or any of the numerous common schools in this state. Nor has it undertaken to do so. It has simply "prescribed" a course of study to be followed in the schools during designated years, and especially in graded schools. Many of the schools are not, strictly speaking, graded at all. Indeed, the legislature seems to have assumed that only the schools in incorporated cities and towns would be graded. See ch. 2, §§ 72 and 73, of the code of public instruction. And, as we have seen, the directors in such districts where the employment of more than one teacher is required are empowered to grade the schools in such a manner as they shall deem best suited to the wants and conditions of such districts; subject, however, to the limitation that the course of studies established for such districts shall not be inconsistent with the laws of the state.

The trial court found, and the evidence shows, that the state board of education entered into the contract above set out with the appellant, at the time therein mentioned; that, at or about the same time, said board adopted a series of text books for the use of the common schools for the period of five years from and after September 1, 1900, and prepared and published a course of study for the schools of the state. The series of books adopted by the board included St. John's Writing Tablets and the text book on civics entitled "Why We Vote" (both published by appellant), and the state course of study required the use of the former for the fifth, sixth, seventh, and eighth school years, and the latter for the sixth year. The respondents, as directors of school district No. 1, graded the schools and established a course of study therein, prescribing the use of St. John's Writing Tablets, in conjunction with Heath's Copybook, during the fourth as well as the fifth, sixth, seventh, and eighth

years or grades, and "Why We Vote" in class A, or during the latter half of the sixth year of the schools. The state course of study prescribed Heath's Copybook or Vertical System of Writing, for the first four or primary grades, and St. John's Writing Tablets for the second four or grammar grades. The course of study established by the respondents for the schools under their charge provides for two classes, B and A, the former embracing the first, and the latter the last, half of each school year. Under this arrangement, the pupils, on completion of their studies in class B, are regularly passed into class A. It appears from the complaint herein that the deviations, above mentioned, of the course of study established by the respondents, and followed in the schools of Olympia (which is included in said district No. 1), from the course of study adopted by the state board of education, constitute the basis of appellant's cause of action. And, in order to obtain the relief demanded, it is incumbent upon the appellant to prove, not only that the acts on the part of the respondents, of which it complains, are inconsistent with the laws of the state, but that it was, or will be, as alleged, irreparably injured or at least materially damaged thereby; and the learned judge of the court below concluded that the appellant failed to establish, at the trial, either of those propositions. It was admitted by the respondents at the beginning of the trial, as alleged in the complaint, that the school district involved in this proceeding does not embrace within its limits a city containing ten thousand or more inhabitants; and it is not pretended that certain provisions of the statute relating to the adoption of text books by the directors of such districts are applicable to the case at bar.

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The first and principal contention of appellant is that, by virtue of its contract, it is entitled to the exclusive right to have the text books mentioned therein used in the schools during the entire years for which they were adopted and prescribed by the state board of education, and that the action of the respondents, in prescribing and permitting the use of other books, covering the same subject matter, either parallel with, or to the exclusion of, the books so adopted, affords a just and legal ground for the issuance of the writ of injunction, as prayed. And it must be conceded that appellant's contract is an exclusive one to the extent, at least, that the books published by it, and adopted by the proper state officials, may not be supplanted, during the life of the contract, by other text books on the same subject. But we find no evidence in the record showing that either St. John's Writing Tablets, or the book on civics "Why We Vote," has not been used at all in the schools of this district in the years designated in the state course of study. If the respondents were warranted by law in causing Heath's Copy Book to be used in the grammar grades in connection with St. John's Writing Tablets, it follows that the appellant has no cause of complaint upon that ground; and whether they were so warranted depends upon the intention of the legislature in enacting the section of the statute granting and defining their powers as to grading the schools and establishing a course of study.

The power to grade the schools of districts, where grading is necessary, is plainly and explicitly conferred upon the board of directors by § 73 of the school law; and the power to establish a course of study not inconsistent with law is impliedly conferred by the proviso contained in that section. It being the province of the directors of the school district embracing the city of Olympia to

grade the schools therein, and to establish in accordance with law a course of study for such district, the question arises whether they transcended their authority in grading the schools and establishing the course of study above mentioned. The appellant contends that they did; and, if § 27 of this code of public instruction and the other sections thereof, hereinbefore designated, which require the directors and other school officers to enforce the course of study prepared by the state board, were the only sections in the act relating to the subject of courses of study, we would find no difficulty whatever in sustaining appellant's contention. But, in order to determine the real meaning of the legislature as to the power of school directors, it is necessary to read and consider § 73, as well as all other provisions of the statute pertaining to the same subject. And it will be perceived that the proviso in that section, which seems clearly to imply that the directors in districts such as the one in question may establish, for such districts, a course of study not inconsistent with the law of the state, is apparently repugnant to the provision in § 27 which plainly authorizes the state board of education to prepare a course of study for the various departments of the common schools. Construing these two sections so as to give force and effect to each of them, the lower court arrived at the conclusion,

"That the legislature intended that the state board of education should adopt a course of study that could be adjusted to the several school districts according to their conditions and requirements; and that the board of directors, in grading their district, . . . should establish a course of study for their district by fitting the state course to the grades established for their district," and, therefore, held that the course of study adopted by

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the respondents for the schools of this district is not inconsistent with the laws of the state, or the rights of the appellant.

But we do not think that the construction placed by the court upon the proviso in § 73, as we understand it, is entirely correct, for it appears to us, from a consideration of that provision, together with all other cognate provisions of the statute, that it was the intention of the legislature to authorize or permit the directors of designated school districts to establish only such courses of study as are consistent with the course adopted by the state board of education. To hold otherwise, would be to hold that the legislature intended to confer upon certain boards of school directors practically the same power as to the adoption of courses of study that it had already conferred, by § 27, upon the state board of education; and there is no provision in § 73, or elsewhere in the statute, which would justify such a conclusion. We therefore think it was the purpose of the legislature to provide for one, and only one, course of study for the graded schools in cities such as Olympia, and that the course of study established by respondents was, and is, inconsistent with the law of the state, in so far as it departs from the state course of study. But it does not necessarily follow, from this conclusion, that the appellant is entitled to the relief sought in this action. In *Rand, McNally & Co. v. Hartranft*, 29 Wash. 591, 70 Pac. 77, which was an action for an injunction based on a contract similar to the one here in question, this court, after having carefully considered the authorities bearing on the question in hand, said:

"We are constrained to the conclusion, therefore, that the weight of authority is in support of the principle that equity will not interfere by injunction in behalf of

one who is merely nominally damaged as to profits arising from a contract such as the one at bar. The wrong asserted must be more than a mere technical or inconsequential one to warrant equitable interference."

That case is decisive of this, so far as the merits of the case are concerned. There is no evidence in the record showing that appellant has been, or will be, more than nominally damaged, if damaged at all, by the alleged wrongful action on the part of the respondents. It is true, one of the teachers in the seventh grade, who testified as a witness for appellant, said he thought more of St. John's Tablets would be used in that grade if Heath's Copy Books were not also used. But how many more of such tablets would be used if the copy book were discarded is not shown by the evidence. Moreover, the testimony in the case shows that these writing tablets have been regularly used in the schools of the district from the fourth to the eighth years, inclusive, which is one year more than the state course of study requires. How, then, can it be successfully maintained that the appellant has not furnished as many of these tablets as it was entitled, under the contract, to furnish for the use of the schools in question?

The contention that the appellant has been damaged by the failure of the respondents to cause the text book "Why We Vote" to be used in class B as well as in class A of the sixth year is not tenable. In the first place, the state course of study does not contemplate or require the use of that publication at all times during that year, for it is suggested therein that such book may be used alternately with some reader. And, in the second place, it does not appear that there were any pupils in the sixth grade who did not purchase and study that book. The proof shows, and the court found, that the

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respondents have required each pupil in class A of the sixth year to study said text book "Why We Vote" in such manner as to acquire "a proficient knowledge thereof;" that they have, in good faith, and in such manner as they believed the grading of the schools permitted, required said text book "to be taught in said sixth year, or grade," and that "the pupils in class B are, during the sixth year, promoted to class A." The school directors and teachers must be permitted to exercise some discretion in determining the length of time, in each year, which should be devoted to the study of a particular book or subject, for otherwise it would be difficult, if not impracticable, properly to grade the schools, or to classify the pupils; and it would seem unreasonable to require a pupil to continue to study any of the branches taught in the school after he has become proficient therein. The appellant was, by the terms of its contract, only entitled to furnish this text book "in sufficient quantities for the use of the common schools of Washington for the full term of five years;" and it does not satisfactorily appear that it has, at any time, been deprived by the respondents of the right to so furnish it for the use of the schools of Olympia.

In regard to the objection of appellant that the finding of the trial court that the school district in question is one requiring the employment of more than one teacher, is not within the issues formed by the pleadings, and is unsupported by the evidence, it is perhaps sufficient to observe that, although the question of the character of the district was virtually eliminated from the issues to be tried, by the ruling of the court upon the plaintiff's demurrer to the affirmative defenses set up in the answer, still the record discloses that as many as three teachers employed in the schools were called as

witnesses at the instance of the appellant, and that they testified on the trial without objection by either party. This is, we think, persuasive evidence in favor of the finding of the court in question, and the court was justified in considering the pleadings amended in conformity with the evidence. Indeed, it might easily be inferred from the complaint herein that this district No. 1 is one of that class of districts which necessarily requires the employment of more than one teacher.

Our conclusion is that the judgment is right, and it is therefore affirmed with costs.

We shall not extend this opinion by discussing the numerous questions raised by the defendants on their cross-appeal, for the reason that the affirmance of the judgment renders them immaterial.

Before the trial of this cause between the original parties, one David Lincoln applied to the court, by petition, for leave to intervene in the action, by joining the defendants in resisting the claims of the plaintiff. The petition, after reciting that the petitioner is a resident of, and a taxpayer in, school district No. 1 of Thurston county, and the father of children attending school in said district, alleges substantially the same facts which were stated in the amended answer of the defendants. This petition was denied and the petitioner appealed.

Our statute, Bal. Code, § 4846, provides that "Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation in the success of either party, or an interest against both." The sole question for determination on this appeal is, has the petitioner such an interest in the *matter in litigation* between the original parties as entitles him to intervene? And we are of the opinion that he has no such interest. The matter in litigation here—in

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other words, the subject matter of the action—as contradistinguished from the *cause of action*, which is an entirely different thing—is the plaintiff's contract and its claims thereunder, and these are certainly matters in which this appellant has no legal interest whatever. In delivering the opinion of the court in *Horn v. Volcano Water Co.*, 13 Cal. 69, Field, J., said:

“The interest mentioned in the statute, which entitles a person to intervene in a suit between other parties, must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. . . . To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit, or a claim to, or lien upon, the property, or some part thereof, which is the subject of litigation.”

The doctrine thus stated by Judge Field is approved by Mr. Pomeroy in his treatise on Code Remedies (3d ed.), § 430. And this California case was cited and followed by the supreme court of Nevada in *Harlan v. Eureka Mining Co.*, 10 Nev. 92, in interpreting a statute identical with that of this state. Tested by the above authorities—and many more to the same effect might be cited—the order denying appellant's petition was right, and it is therefore affirmed. No costs will be recovered by either party on this appeal.

(No. 4877. Decided December 29, 1904.)

RAND McNALLY & COMPANY, *Appellant*, v. M. G. ROYAL
et al., as *Directors of School District No. 1, of Thurston County, Respondents and Appellants.*¹

APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS—MOTION TO STRIKE. It is not prejudicial error to refuse to strike out averments from a complaint which amount to conclusions of law.

SCHOOLS—COURSE OF STUDY ADOPTED BY STATE BOARD—EVIDENCE OF ADOPTION—SUFFICIENCY. There is sufficient evidence to support a finding that the state board of education adopted a uniform series of text books and a course of study for the public schools, where it appears that the same was published throughout the state, apparently by their authority, and was generally recognized as valid and acted upon by school districts, including the defendant.

SCHOOLS—STATE BOARD OF EDUCATION—CONTRACTS—EXECUTION OF AGREEMENT TO FURNISH TEXT BOOKS. A contract with a publisher to furnish text books for the use of the public schools of the state appears to be sufficiently executed by the state board of education when it is signed by the president and secretary of the board, when it was suggested by the board, without objection, at the time the subject was discussed, that such signatures would be sufficient.

SAME—CONTRACT WITH PUBLISHER TO FURNISH TEXT BOOKS—VALIDITY—ATTACK BY SCHOOL DISTRICT. Where the state board of education has entered into a written contract with a publisher for furnishing the text books prescribed by the course of study for the public schools of the state, a school district can not question its validity in an action brought to enjoin the district from using other books on the same subject, when the state has raised no objection thereto; since the district was not a party to the contract.

SCHOOLS—FOLLOWING COURSE OF STUDY PRESCRIBED BY STATE BOARD—BOND OF PUBLISHER—APPROVAL. The fact that the publisher of text books, who is under contract with the state board of education to supply all the books required by the public schools

¹Reported in 78 Pac. 1103.

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36	432
36	434
36	436
36	437

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of the state, fails to have its bond to the state duly approved, does not excuse a school district board for failing to enforce the course of study prescribed by the state board.

SAME—UNIFORM COURSE OF STUDY—SCHOOL DISTRICT REGULATIONS—COMPLIANCE WITH STATE COURSE. Where the course of study prescribed by the state board of education requires the use of certain text books in specified grades, a regulation of a school district that the pupils in such grades shall use such books until they become "proficient therein" is a sufficient compliance with the state course of study.

SAME—INJUNCTION. But in such case, where such books prescribed in the state course of study are not required by the district to be used at all in a certain grade, whether inadvertently or intentionally, it is not a compliance with the state course of study, and injunction is properly issued to compel compliance therewith by the district.

Cross-appeals from a judgment of the superior court for Thurston county, Linn, J., entered February 2, 1903, upon the findings and decision of the court, after a trial on the merits before the court without a jury, granting part of the relief prayed for in an action to compel compliance with the course of study prescribed for public schools. Affirmed.

Vance & Mitchell and Ballinger, Ronald & Battle, for appellant.

C. D. King, M. G. Royal, and Troy & Falknor, for respondents.

PER CURIAM.—The plaintiff is a corporation, organized under the laws of the state of Illinois, and authorized to do business in the state of Washington. It is the publisher of certain text books on reading, designated as Lights to Literature No. 1 and No. 2, and New Century Reader No. 3, No. 4, No. 5, and No. 6. In May, 1900, it contracted in writing with the state board of education to furnish said books in sufficient quantities for the

use of the common schools of Washington, for the full term of five years from and after September 1, 1900, at prices stipulated in the contract "in accordance with the law governing the same." The defendants constitute the board of directors of school district No. 1, of Thurston county, which district embraces within its boundaries the city of Olympia, a city containing less than ten thousand inhabitants. The plaintiff seeks, in this action, to obtain a mandatory injunction against the defendants, commanding them, in their official capacity, to cause plaintiff's publications—the books above mentioned—to be used in the schools of Olympia in the manner and at the times indicated in the course of study prescribed by the state board of education, and as provided for in its contract with said state board. The pleadings in this case are almost identical with the pleadings in the case of *Westland Publishing Co. v. Royal* (*ante* p. 399), just decided, and, as they are set forth quite fully in the opinion of the court in that case, we do not deem it necessary to reproduce them here.

By § 27 of the code of public instruction (Laws 1897, p. 356, *et seq.*), the state board of education was empowered, among other things, to adopt or readopt, according to law, a uniform series of text books for the use of the common schools throughout the state, and to prepare a course of study for the primary, grammar and high school departments of the common schools. Section 105 of said code provides the manner in which said state board shall adopt such uniform system of text books for the use of the common schools, including graded schools, and also empowers the state board of education to enter into contracts with the publishers of adopted books for supplying the same for five years, to take effect on the first day of September following the date of adop-

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tion. Section 73 of said code provides that, in city or town districts, where the number of children of school age is sufficient to require the employment of more than one teacher, the school or schools therein shall be graded in such a manner as the directors thereof shall deem best suited to the wants and conditions of such districts; provided, that the course of study established for such districts shall not be inconsistent with the laws of this state. According to the course of study prepared by the state board of education, the plaintiff was entitled, under its contract, to have its series of readers used in the schools of Olympia in grades one to six, inclusive, during the life of its contract. But according to the course of study for the schools of the city, established by the defendant board of directors, the New Century Reader No. 6 was not required to be used in the sixth grade in such schools, or at all.

Upon the trial the court found, in effect, among other things, that the defendants had required all of the text books mentioned in plaintiff's complaint to be used in the schools of Olympia in a lawful and proper manner, except reader No. 6, and thereupon rendered a judgment in favor of the plaintiff, commanding the defendant board of directors to require the use of, and to use, the said text book, New Century Reader No. 6, in the schools of the city, as an exclusive text book on reading, during the sixth year of said schools. The plaintiff has appealed from this judgment for the reason, stated generally, that it is entitled to greater relief, and the defendants have appealed upon the alleged ground that the plaintiff is entitled to no relief whatever.

The defendants object to the action of the trial court in refusing to strike out certain allegations of the complaint, and in overruling their demurrer to the com-

plaint. But we think neither of these objections is well founded. We are unable to see how the statements which the defendants asked to have eliminated from the complaint could possibly have prejudiced their rights upon the trial. The complaint is lengthy and circumstantial, and we think it states a cause of action, even conceding, as defendants assert, that certain averments thereof amount to conclusions of law rather than statements of facts.

The defendants insist that the state board of education did not adopt a list of text books for use in the public schools of the state, as alleged in plaintiff's complaint, but we are of the opinion that the evidence is sufficient to justify the finding that that board not only adopted a uniform series of text books for the use of the common schools of the state, but prepared a course of study for the various departments of the common schools. At all events, it appears that a series of text books and a course of study for the public schools throughout the state were published, apparently by authority of the state board of education; both of which have, as a matter of fact, been recognized as valid, and acted upon accordingly by the various boards of school directors, including the defendant board. And that being so, it would seem that the defendants ought not now to be heard to challenge either the state adoption of text books or the state course of study.

It is further insisted by the defendants that the plaintiff cannot successfully maintain this action for the reason that its alleged contract is illegal and void. This claim of illegality is based upon the propositions, (1) that plaintiff's pretended contract was not executed by the state board of education, and (2) that, if it was properly executed, it was not such a contract as said

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board was authorized to enter into with the plaintiff. The contract in question was signed only by the president and the secretary of the board, and, although the evidence in this case does not show that those individuals were expressly authorized by the board to execute the contract on its behalf, the testimony in another case submitted herewith, and which by stipulation of counsel is to be considered as evidence herein, does show that the subject of the method of executing contracts with the publishers of school books was discussed by the state board of education, and that it was suggested (without objection so far as the evidence discloses) that the signatures of the president and secretary to such contracts would be sufficient. We think the contract cannot be said to be invalid on the alleged ground that it was not executed as required by law.

Neither are we disposed to hold it invalid on the ground that the state board of education had no power to make it. As we have seen, the power to enter into contracts with publishers for the supplying of text books for use in the public schools is expressly conferred by law upon the state board of education. Boards of school directors are not parties to such contracts, and therefore really have no right to question their sufficiency or legality, in actions such as the one at bar. In the language of the supreme court of Minnesota, "That belongs to the parties to the contract." *Curryer v. Merrill*, 25 Minn. 1. See, also, *State ex rel. Roberts v. School Directors*, 74 Mo. 21. This contract itself provides that it shall be null and void at the option of the state board of education, if the plaintiff fail to comply with all the terms thereof, provided a reasonable notice be given to the plaintiff, together with a reasonable opportunity "to fulfill the terms of this agreement." The plaintiff has at

all times faithfully complied with the terms of its contract, and the evidence fails to show that any objections thereto have ever been made, either by the state directly, or by its board of education. And, under such circumstances, it would be, to say the least, extremely unjust to the plaintiff to declare the contract invalid at the instance of a third party having no interest therein or right to interfere therewith.

It does not appear from the evidence that the bond, given by the plaintiff to insure the performance of its contract, was formally approved by the state board of education and the attorney general, as provided by the statute, and the defendants insist that that alone is sufficient to preclude the plaintiff from recovering in this suit. The evidence does show, however, that the bond was delivered to the state superintendent of schools, who was the president of the board of education, and was filed by him, and kept in the proper place in his office, which acts tend to show, at least inferentially, that the bond was in fact approved by the board. Of course the plaintiff should have had the bond regularly approved, both by the board of education and by the attorney general. But that, again, is a matter which in no way concerns the defendants. The duties and powers of school directors are defined and limited by law. It is their positive duty, under § 40 of the act of 1897, *supra*, "to enforce the course of study prescribed by the state board of education." It is also their duty, as we have seen, under § 73, to grade the schools in districts, such as the one here under consideration, in such a manner as they shall deem best suited to the wants and conditions of their district. And the same section empowers the directors to establish a course of study for such districts not inconsistent with the laws of the state, which means, as

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we endeavor to show in the *Westland Publishing Co.'s* case, above mentioned, not inconsistent with the course of study prescribed by the state board of education.

The only remaining question which it is necessary to discuss is whether the defendants caused the plaintiff's readers Nos. 1 to 5, inclusive, to be used during the first, second, third, fourth and fifth years, or grades, for the time, in the manner, and with the good faith contemplated by the state course of study. It appears from the evidence that each pupil in any one of those grades was required to purchase the reader prescribed for such grade and to study the same until he or she became "proficient therein." And, in our opinion, nothing more than that was required by the plaintiff's contract, so far as the grades above mentioned are concerned. But with regard to the sixth grade the case is different, for in that grade plaintiff's reader was not used at all. There is testimony in the record, however, going to show that it was omitted from the established course of study through mere inadvertence on the part of the board of directors, and not intentionally. But, if that be true, the mistake should, nevertheless, be corrected.

The judgment is affirmed, but without cost to either party in this court.

(No. 4878. Decided December 29, 1904.)

HARR WAGNER, *Appellant*, v. M. G. ROYAL *et al.*, *as*
Directors of School District No. 1, of Thurston
*County, Respondents and Appellants.*¹

APPEAL—PARTIES—SURETIES ON COST BOND—SERVICE OF NOTICE UPON. Sureties upon the cost bond of a nonresident plaintiff, against whom no judgment is entered, are not necessary parties to the appeal upon whom notice of the appeal need be served.

SCHOOLS—STATE BOARD OF EDUCATION—CONTRACT WITH PUBLISHER TO FURNISH TEXT BOOKS—VALIDITY—ATTACK BY SCHOOL DISTRICT. Where the state board of education has entered into a written contract with a publisher for furnishing the text books prescribed by the course of study for the public schools of the state, a school district can not question its validity in an action brought to enjoin the district from using other books on the same subject, when the state has raised no objection thereto; since the district was not a party to the contract.

SAME—COURSE OF STUDY ADOPTED BY STATE BOARD—EVIDENCE OF ADOPTION—SUFFICIENCY. There is sufficient evidence to support a finding that the state board of education adopted a uniform series of text books and a course of study for the public schools, where it appears that the same was published throughout the state, apparently by their authority, and was generally recognized as valid and acted upon by school districts, including the defendant.

SAME—FOLLOWING COURSE PRESCRIBED BY STATE BOARD. It is the duty of school directors to follow the course of study prescribed by the state board of education.

SAME—BOND OF PUBLISHER—APPROVAL. The fact that the publisher of text books, who is under contract with the state board of education to supply all the books required by the public schools of the state, fails to have its bond to the state duly approved, does not excuse a school district board for failing to enforce the course of study prescribed by the state board.

SAME—CHANGE IN TEXT BOOK. It is not a sufficient excuse for a school district to refuse to follow the course of study prescribed

¹Reported in 78 Pac. 1094.

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by the state board of education that certain changes have been made in a text book prescribed, where the contract with the state board for such book provided for the changes therein.

SAME—UNIFORM COURSE OF STUDY—SCHOOL DISTRICT REGULATIONS—COMPLIANCE WITH STATE COURSE. Where the course of study prescribed by the state board of education requires the use of certain text books in specified grades, a regulation of a school district that the pupils in such grades shall use such books until they become "proficient therein" is a sufficient compliance with the state course of study.

SAME—DAMAGE. A finding that the publisher of a text book prescribed for use in the public schools by the state board of education is not damaged by the fact that the book is not used during the entire year in certain grades, is warranted by the evidence where it appears that all the pupils in such grades were required to purchase the book and use the same until they become proficient therein.

Cross-appeals from a judgment of the superior court for Thurston county, Linn, J., entered February 2, 1903, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action for an injunction. Affirmed.

Vance & Mitchell and *Ballinger, Ronald & Battle*, for appellant.

C. D. King, M. G. Royal, and *Troy & Falknor*, for respondents.

PER CURIAM.—The defendants move the court to dismiss the appeal of the plaintiff, for the reason that he did not serve the notice of appeal upon the sureties on the cost bond, which he gave as a nonresident of this state. This court has recently held that the trial court is not authorized by law to render judgment against the sureties on such bond, in the action in which the bond is filed, and that, in the absence of any judgment against such sureties, they are in no sense parties to the action,

and therefore need not be served with notice of appeal. No judgment was entered against the sureties in this instance, and the motion to dismiss the appeal is therefore denied. *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643; *Aetna Ins. Co. v. Thompson*, 34 Wash. 610, 76 Pac. 105.

The plaintiff is the author and publisher of a text book for schools, known as the New Pacific Geography, and the defendants constitute the board of directors of school district No. 1, of Thurston county, which district does not embrace within its limits a city containing ten thousand or more inhabitants, but is a school district in which there is a sufficient number of children of school age to require the employment of more than one teacher. The plaintiff, claiming to have a valid contract with the state board of education, for supplying said book at prices specified in the contract in sufficient quantities for the use of the common schools of the state, for the term of five years from and after September 1, 1900, instituted this action for a mandatory injunction compelling the defendants, as said board of directors, to cause the said geography to be used in the public schools of the city of Olympia (which city is included in said district No. 1), in accordance with the terms of his contract and the course of study prescribed by the state board of education.

The facts alleged in the complaint in this case (except, of course, as to the name of plaintiff and the book in question and the price thereof) are substantially the same as those stated in *Westland Publishing Company* against these defendants, just now decided but not yet reported (*ante* p. 399), and we shall not attempt to restate them here. The answer of the defendants consists of denials of most of the material allegations of

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the complaint, together with three affirmative defenses, to the second and third of which the court sustained a general demurrer. By the defenses which were eliminated from the pleadings by the ruling of the court upon the plaintiff's demurrer, the defendants challenged the validity of plaintiff's alleged contract, and the bond given by him for its faithful performance; and, also, undertook to show that the plaintiff had, before the commencement of this action, assigned all his interest in, and right to, the New Pacific Geography to the Westland Publishing Company, and was, therefore, not a proper party to maintain this action. From the evidence adduced at the trial, and the various stipulations of counsel, the lower court found, among other things, that the course of study adopted by the defendants for the schools of said school district No. 1 does not violate any of the laws of this state, or conflict with the state course of study prescribed by the state board of education, to the detriment of the plaintiff; that, in all the classes and grades wherein the state course of study requires the use of the New Pacific Geography, the defendants herein have caused the same to be taught in the schools of Olympia, except in the second half of the fifth year; that the New Pacific Geography has been taught in the schools of Olympia, in good faith, and in such manner that the pupils in such schools become proficient therein, and that the defendants in this case have acted in good faith towards the plaintiff in respect to his contract rights, and that the pupils of said school district, in the grades wherein said New Pacific Geography is required to be taught, according to the local course of study, are required to purchase, and have in their possession, copies of said geography. From the facts as found, the court con-

cluded, that the defendants had not exceeded their authority in establishing the course of study adopted by them; that the plaintiff had not been damaged by the action of the defendants in respect to the use of said geography; that the plaintiff was not entitled to any relief herein; and that the defendants were entitled to a judgment of dismissal, and for their costs and disbursements herein. A judgment was accordingly entered, dismissing the proceeding, and both parties have appealed therefrom.

The first point made by the defendants is that the court erred in sustaining the demurrer to the second affirmative defense, set up in the defendants' answer. That defense, as we have already intimated, purported to state facts showing that the state board of education acted beyond the authority conferred upon them by law in the execution of these contracts, and that their contract with plaintiff was consequently void, and not binding upon the defendants. The state board of education is positively and exclusively empowered, by § 105 of the code of public instruction (Laws 1897, p. 356), to enter into contracts with publishers for the supply of text books for the public schools. The contract in question having been executed on behalf of the state by the only persons or body authorized to execute it, and having been, so far as we are informed, faithfully performed by the plaintiff, and without objection on the part of the state or its agent, the state board of education, ought not now to be declared invalid, especially in this proceeding. The defendants were not parties to this contract, and therefore have no concern therein and no right to interfere therewith. *Curryer v. Merrill*, 25 Minn. 1, 8. See, also, *Rand, McNally & Co. v. Royal*, (*ante* p. 420) which was herewith submitted and considered, and *State ex rel*

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Roberts v. School Directors, 74 Mo. 21. The demurrer aforesaid was properly sustained as to both of said defenses.

It is next claimed that the court erred in refusing to find that the state board of education did not, as alleged in the complaint, adopt a course of study for the public schools of the state. While this contention is in accord with the issue tendered by defendants by their denial in the answer, it is, nevertheless, contrary to the position assumed by them at the trial, for they there insisted, and produced testimony to show, that a course of study purporting on its face to have been published by authority of the state board of education had been, in good faith, observed in the schools of the city of Olympia. Although there may have been some irregularity in the method of doing it, we think the evidence sufficiently shows that the state board of education did prepare a course of study, which was generally recognized as such by the various boards of school directors. At all events, it is certain that a general course of study, appearing to have been prepared and published by the only body lawfully authorized so to do, came to the knowledge, and into the possession, of the defendants and was by them treated as the state course of study. And, besides, it appears from the evidence that plaintiff's geography was in fact adopted as a text book by the state board of education, to be used in the common schools in the fifth and sixth years or grades of such schools, not necessarily at all times during those years, but for such length of time as may be required for the mastery thereof by the pupils.

But, aside from all this, it is not the province of school directors to adopt a course of study according to their own notions of what such a course should be. And

if they were permitted to do so, the result would be, in a large measure, to destroy that uniformity of our public school system which is contemplated by the constitution and laws of this state. It is the duty of school directors, enjoined on them by law, to enforce the course of study prescribed by the state board of education, and not to adopt and enforce some other course, inconsistent therewith, which they may deem superior thereto. See Laws, 1897, p. 373, § 40, *et seq.* We perceive no substantial merit in defendant's contention that the proof shows that the plaintiff is not in fact the real party in interest, for, as we view it, the evidence discloses a contrary state of facts.

The defendants further contend that the bond executed by plaintiff to secure the faithful performance of his contract was not conditioned or approved as provided by law, and was therefore null and void. This same point was made by these defendants in the case of *Rand, McNally & Co. v. Royal, supra*, and we there held that the form and sufficiency of a similar bond were not matters in which the defendants were in any way interested or concerned.

We deem it a sufficient answer to the proposition advanced on behalf of the defendants, that the New Pacific Geography, as now published, is not the book which the state board of education adopted or pretended to adopt, because of the fact that many changes have been made therein, to observe that the plaintiff's contract plainly provided for the changes in, and additions to, said geography which he has since made.

Inasmuch as what we have already said disposes of the material questions of law discussed in the brief of the plaintiff, we will now proceed to determine whether the facts appearing in the record are sufficient to warrant

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Syllabus.

the findings and judgment of the trial court. It will be remembered that the court found that, in all the classes and grades in which the state course of study requires the use of plaintiff's geography, the defendants "have caused the same to be taught in the schools of Olympia, Washington, except in the second half of the fifth year," and that said geography has been used in said schools in such manner that the pupils become proficient therein. And we are not prepared to say that the evidence is not sufficient to support these findings. And, in view of the further fact that each pupil in the fifth and sixth grades has been required to purchase, and have in possession, the New Pacific Geography, we are constrained to conclude that the court was, also, right in finding that the plaintiff has not been damaged by the acts of the defendants of which he complains. And that being so, it follows according to the rule announced in *Rand, McNally & Co. v. Hartranft*, 29 Wash. 591, 70 Pac. 77, and followed in *Westland Publishing Company v. Royal*, *supra*, that the judgment of the trial court must be affirmed, and it is so ordered. Neither party will recover costs in this court.

(No. 4879. Decided December 29, 1904.)

EATON & COMPANY, *Appellant*, v. M. G. ROYAL *et al.*,
as Directors of School District No. 1, of Thurston
*County, Respondents and Appellants.*¹

SCHOOLS—UNIFORM COURSE OF STUDY—COMPLIANCE WITH COURSE PRESCRIBED BY STATE BOARD OF EDUCATION—DAMAGES. Where the course of study prescribed by the state board of education requires the use of a certain text book in specified grades, and the evidence shows that as to one of such grades it was not adopted by the school district, it may be assumed that the publisher is deprived of a portion of the benefit which it is entitled to receive from its

¹Reported in 78 Pac. 1093.

contract to supply all of such books required by the public schools of the state, and an injunction should issue at the suit of the publisher, requiring the school directors to cause the same to be used in the grades for which it was prescribed.

Cross-appeals from a judgment of the superior court for Thurston county, Linn, J., entered July 14, 1902, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action for an injunction. Reversed.

Vance & Mitchell and *Ballinger, Ronald & Battle*, for appellants.

M. G. Royal, C. D. King, and *Troy & Falknor*, for respondents.

PER CURIAM.—The plaintiff corporation is the publisher of a text book for the use of schools, designated as *The New Era History of the United States*, and, as such publisher, it entered into a contract with the state board of education, wherein it agreed to supply said publication in sufficient quantities for the use of the public schools of the state, for the term of five years from and after September 1, 1900. This action was instituted by the plaintiff to obtain an injunction commanding and compelling the defendant board of directors to cause the plaintiff's said history to be used throughout the seventh and eighth grades or years of the public schools of the city of Olympia. From a judgment dismissing the action both parties have appealed.

The several legal questions presented herein by both appellants have already been considered and determined in *Westland Publishing Co. v. Royal* (*ante* p. 399), *Rand, McNally & Co. v. Same* (*ante* p. 420), and *Wagner v. Same* (*ante* p. 428), and, as the reasons on which

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the court's conclusions were based are fully set forth in the opinions of the court therein (and which will be filed herewith), we shall not repeat them here, but content ourselves by endeavoring to ascertain whether the judgment of the trial court is supported by the evidence.

The course of study prescribed by the state board of education required the plaintiff's history to be used in the seventh and eighth years of the schools, and, as we have shown in the cases above cited, it was the absolute duty of the defendant directors to enforce, at least substantially, such course of study. But it appears from the evidence, and the court found, that the plaintiff's history was not used at all in the seventh year of said schools. And such being the case, we are of the opinion that the learned judge erred in holding that the plaintiff was not damaged thereby, and was, therefore entitled to no relief in this action. We think it can safely be assumed that the plaintiff has been deprived of a portion of the benefit which it is entitled to receive, under its contract, by the failure of the defendants to cause its text book to be used as such in the schools under their supervision during the seventh year, or any portion thereof, of such schools. The non-observance of duty, on the part of these defendants, which was shown in the *Rand, McNally & Co.* case (herewith decided) was no more culpable than that appearing in this case, and yet the trial court in that case ordered the issuance of a mandatory injunction against the defendants, and this court sustained the judgment.

For the error above indicated the judgment herein is reversed, and the cause remanded with directions to the court below to issue a writ of mandate commanding the defendants, as the board of directors of school district

contract to supply all of such books required by the public schools of the state, and an injunction should issue at the suit of the publisher, requiring the school directors to cause the same to be used in the grades for which it was prescribed.

Cross-appeals from a judgment of the superior court for Thurston county, Linn, J., entered July 14, 1902, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action for an injunction. Reversed.

Vance & Mitchell and *Ballinger, Ronald & Battle*, for appellant.

M. G. Royal, C. D. King, and *Troy & Falknor*, for respondents.

PER CURIAM.—The plaintiff corporation is the publisher of a text book for the use of schools, designated as *The New Era History of the United States*, and, as such publisher, it entered into a contract with the state board of education, wherein it agreed to supply said publication in sufficient quantities for the use of the public schools of the state, for the term of five years from and after September 1, 1900. This action was instituted by the plaintiff to obtain an injunction commanding and compelling the defendant board of directors to cause the plaintiff's said history to be used throughout the seventh and eighth grades or years of the public schools of the city of Olympia. From a judgment dismissing the action both parties have appealed.

The several legal questions presented herein by both appellants have already been considered and determined in *Westland Publishing Co. v. Royal* (*ante* p. 399), *Rand, McNally & Co. v. Same* (*ante* p. 420), and *Wagner v. Same* (*ante* p. 428), and, as the reasons on which

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the court's conclusions were based are fully set forth in the opinions of the court therein (and which will be filed herewith), we shall not repeat them here, but content ourselves by endeavoring to ascertain whether the judgment of the trial court is supported by the evidence.

The course of study prescribed by the state board of education required the plaintiff's history to be used in the seventh and eighth years of the schools, and, as we have shown in the cases above cited, it was the absolute duty of the defendant directors to enforce, at least substantially, such course of study. But it appears from the evidence, and the court found, that the plaintiff's history was not used at all in the seventh year of said schools. And such being the case, we are of the opinion that the learned judge erred in holding that the plaintiff was not damaged thereby, and was, therefore entitled to no relief in this action. We think it can safely be assumed that the plaintiff has been deprived of a portion of the benefit which it is entitled to receive, under its contract, by the failure of the defendants to cause its text book to be used as such in the schools under their supervision during the seventh year, or any portion thereof, of such schools. The non-observance of duty, on the part of these defendants, which was shown in the *Rand, McNally & Co.* case (herewith decided) was no more culpable than that appearing in this case, and yet the trial court in that case ordered the issuance of a mandatory injunction against the defendants, and this court sustained the judgment.

For the error above indicated the judgment herein is reversed, and the cause remanded with directions to the court below to issue a writ of mandate commanding the defendants, as the board of directors of school district

No. 1, of Thurston county, to cause the said New Era History of the United States to be regularly used as a text book in the public schools of Olympia during the seventh, as well as the eighth, year of said schools. The plaintiff will recover costs herein.

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(No. 5325. Decided December 30, 1904.)

THE STATE OF WASHINGTON, *Respondent*, v. ERNEST B.
RANDALL, *Appellant*.¹

CRIMINAL LAW — BURGLARY — INFORMATION — UNOCCUPIED outhouse. Under Bal. Code, § 7104, an information which charges an attempted burglary of an outhouse adjoining a dwelling is demurrable if it fails to allege that the same was "occupied therewith," since the common law rule and definition of dwelling has been modified by the statute.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered June 4, 1904, upon a trial and conviction of the crime of burglary. Reversed.

George E. Banks and *George A. Wotton*, for appellant.

MOUNT, J.—Appellant was convicted of an attempt to commit the crime of burglary. Upon this appeal no briefs have been filed on behalf of the state, and no appearance of any kind has been made by respondent. We are therefore led to infer that the correctness of the point made by the appellant and hereinafter discussed is confessed. Appellant demurred to the information upon the ground that it is not sufficient under the statute. This demurrer was overruled and appellant alleges this ruling as error.

¹Reported in 78 Pac. 998.

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Opinion Per MOUNT, J.

The statute defining burglary is as follows:

"Every person who shall unlawfully enter in the night time, or shall unlawfully break and enter in the day time, any dwelling house, or outhouse thereunto adjoining, and occupied therewith, or any office, shop, store, warehouse, malt house, still house, mill, factory, bank, church, schoolhouse, railroad car, barn, stable, ship, steamboat, water craft, or any building in which any goods, merchandise, or valuable things are kept for use, sale, or deposit, within the body of any county, with intent to commit a misdemeanor or felony, shall be deemed guilty of burglary, . . ." Bal. Code, § 7104.

The information is as follows, omitting the formal parts:

"Comes now H. D. Cooley, county and prosecuting attorney in and for Snohomish county, Washington, and by this information accuses Ernest B. Randall of the crime of attempted burglary committed as follows, to wit: That the said Ernest B. Randall, at Welangdon precinct, in the county of Snohomish, and state of Washington aforesaid, on the 22nd day of December, 1903, did unlawfully, feloniously and burglariously attempt to enter in in the night time of said day, a certain outhouse adjoining unto the dwelling house of one Percy Schubert, said outhouse then and there being the property of said Percy Schubert, with intent then and there to commit a felony or a misdemeanor therein, the said Ernest B. Randall then and there being prevented and intercepted in the perpetration of said attempted burglary; contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Washington."

The point contended for is that the information charges an attempted burglary of an "outhouse adjoining unto the dwelling house," without alleging that such outhouse is "occupied therewith." Under the common law the term "dwelling house" included the building or cluster of buildings in which a man with his family resided. Bishop, Stat. Crimes (3d ed), § 278. The term "out-

house" has a well defined and understood meaning. "It denotes a building contributory to the habitation separate from the main structure, either within or without the curtilage." Bishop, Stat. Crimes (3d ed.), § 291.

In our statute the term "dwelling house" is used in its ordinary and usual acceptation, and does not include disconnected buildings which are not occupied by a member of the family. The terms "outhouse thereunto adjoining and occupied therewith" are, also, used in their usual and ordinary sense, and mean that any outhouse to be a subject of burglary must be both adjoining to the dwelling house and occupied therewith. Other outhouses, even though within the inclosure, are not subject to burglary, unless they are specifically named by the statute, or fall within the meaning of buildings named therein. In these respects our statute has modified the common law rules. In order to charge burglary of an outhouse under the statute, it is therefore necessary to allege the building burglarized as both adjoining the dwelling house and occupied therewith. The demurrer should have been sustained.

On account of this error the judgment will be reversed, and the cause remanded for such further action as the lower court may direct.

FULLERTON, C. J. and HADLEY, DUNBAR, and ANDERS, JJ., concur.

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Opinion Per FULLERTON, C. J.

[No. 5325. Decided December 30, 1904.]

THE STATE OF WASHINGTON, *Respondent*, v. TILLEY
BLANCHE RILEY, *Appellant*.¹

CRIMINAL LAW—INFORMATION—AMENDMENT—TRIAL—EFFECT OF SUSTAINING DEMURRER TO INFORMATION AND EVIDENCE—DISCHARGE. A prisoner is not entitled to a discharge upon the sustaining of a demurrer to an information or to the evidence, since it is the duty of the court to correct errors and allow an amendment, and a mistrial upon an insufficient amendment does not constitute jeopardy and is not a bar to another prosecution.

JURORS—COMPETENCY—CHALLENGE FOR CAUSE—DISQUALIFIED BY OPINIONS. Jurors who have formed opinions regarding the guilt or innocence of the accused, which it would take evidence to remove, are disqualified, notwithstanding that they can, or believe they can, disregard such opinions and try the case according to the law and the evidence, and overruling challenges for cause to such jurors deprives the accused of a trial before a fair and impartial jury.

Appeal from a judgment of the superior court for Clallam county, Joiner, J., entered June 28, 1902, upon a trial and conviction of the crime of perjury. Reversed.

Trumbull & Trumbull, for appellant.

George H. Clementson, J. E. Cochran, and James G. McClinton, for respondent.

FULLERTON, C. J.—The appellant was convicted of the crime of perjury, and appeals from the judgment and sentence pronounced against her.

The information upon which the appellant was first rested was filed on November 29, 1901. To this information the appellant filed a demurrer on the ground that it did not state facts sufficient to constitute a crime, which demurrer the trial court, after argument heard thereon, overruled. On December 21, 1901, the state

¹Reported in 78 Pac. 1001.

asked and obtained leave of the court to withdraw the first information, and file another one charging the appellant with the same crime. Leave was given accordingly, and a new information was filed on the same day. To this information also the appellant demurred generally, which demurrer the court also overruled. In January 1902, the appellant was tried for the offense charged in the second information; the trial resulting in a verdict of guilty which was returned on the 25th day of that month. On the 27th day of the same month this verdict was, on the motion of appellant, set aside by the court, on the ground that the appellant had not had a fair or impartial trial. After the new trial had been granted, the state asked and obtained leave to withdraw the second information and file a third one, supporting its application by an affidavit pointing out in what particulars, and for what reason, the state deemed the second information faulty and a new one desirable. This motion was granted, over the objection of the appellant. The appellant was thereafter tried upon this third information, found guilty by the jury, and the judgment and sentence pronounced against her, from which this appeal is taken.

The appellant first contends that the several orders of the court referred to, permitting the withdrawal of the informations filed and the filing of new ones against her, amounted to such a gross abuse of discretion as to entitle her to a discharge, and to a dismissal of the prosecution against her. She concedes that it is largely a matter of discretion with the trial court whether or not the prosecution may amend the information in the course of a criminal proceeding, but she contends that the circumstances here were such that the amendment operated to her prejudice, and deprived her of substantial rights. She urges that, when the court overruled the demurrer to the

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second information, and overruled an objection to the admission of testimony, made at the trial on the ground that the information did not state facts sufficient to constitute a cause of action, that such rulings became the law of the case binding upon the superior court, not subject thereafter to modification or change by it. She urges further that, after the court became convinced that the demurrer and objection to the admission of evidence were well taken, it was its duty to discharge the defendant, rather than grant a new trial and afterwards permit the information to be amended; that these rulings tended to mislead her, as she would not have filed a motion for a new trial had she understood that the court was going to grant it on the ground of the insufficiency of the information, but would have appealed directly from any judgment the court might have pronounced against her.

It is doubtless true that, if the rulings of the trial court complained of prevented the appellant from having a fair and impartial trial on the merits of the controversy, or if they deprived her in any way of a substantial right, guaranteed her by law, which would entitle her to a judgment of acquittal without a determination of the merits, the rulings amounted to error, and she is now entitled to have such a judgment directed in her favor. But we are unable to see in what way the court's rulings could have any such result. It is not error for a court to allow the information to be withdrawn, and another more perfect one be substituted in its stead. *State v. Gile*, 8 Wash. 12, 35 Pac. 417; *State v. Hansen*, 10 Wash. 235, 38 Pac. 1023; *State v. Lyts*, 25 Wash. 347, 65 Pac. 530. Nor was it error to do so after the court had first considered it and adjudged it sufficient. No litigant has a vested right to have an error perpetuated in the record.

If the trial court finds, at any stage of the proceedings prior to the entry of final judgment, that it has committed an error that will render its final judgment voidable or void, it is not only its right but its duty to correct it. So here, if it be true, as the appellant says, that the information on which she was first tried did not state facts sufficient to constitute a crime, it was the duty of the court to set the verdict aside, and allow a new and sufficient information to be filed, and put the appellant to trial thereon. A trial on an insufficient information is a mistrial if a verdict of guilty results. It does not constitute jeopardy, and is not a bar to a subsequent prosecution. There was, therefore, no obligation on the part of the court to discharge the appellant, either on her motion made at the conclusion of the evidence, or at other stages of the case. On the contrary, it was the court's duty, if he believed a crime had been committed and that the appellant had committed that crime, to hold her for further proceedings, so that the question of her guilt could be submitted to the determination of a jury on a sufficient information. Nor would the appellant have been entitled to a discharge had judgment been entered upon the verdict on the first trial, and an appeal therefrom taken to this court, and the judgment reversed for insufficiency of the information. This court will direct a discharge of the defendant, on the reversal of a judgment of conviction, only when it appears that no crime whatever has been committed. Whenever it reverses for mere error committed by the trial court, whether that error be the holding that an insufficient indictment or information is sufficient, or error in the proceedings occurring at the trial proper, it will direct that the defendant be held for further proceedings. This is not only the rule to be derived from the general laws relating to the criminal prac-

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tice, but it is the special mandate of the statute. Bal. Code, Title, Procedure in Criminal Actions. Also, *id.*, § 6532.

In the case before us the order of the trial court permitting the information to be withdrawn, and another one filed in its stead after trial, not only did not violate any legal right of the appellant, but was directly within the court's powers and duties. The appellant is not, therefore, entitled to a reversal of the judgment followed by an order directing her discharge from custody.

Of the errors assigned which call for a new trial, the most serious are on the rulings of the court to the challenges for cause, made to several jurors when being examined touching their qualifications to sit as such.

Juror Kilby testified, that he had heard the facts of the case discussed, and had read newspaper accounts concerning it; that he had both formed and expressed an opinion as to the guilt or innocence of the defendant; that he had that opinion at the time he was being examined and would have it until it was removed by evidence.

Juror Duncan testified, that he had heard parties state what purported to be the facts in the case, and had probably talked to a juror who had set on the first trial of the defendant; that he had both formed and expressed an opinion as to the guilt or innocence of the defendant, and had such an opinion at the time he was being examined; that he would retain that opinion until removed by evidence.

Juror Guttenberg testified, that he had formed an opinion as to the guilt or innocence of the defendant, and had that opinion still; that his opinion was such that it would require evidence to remove it, and that his mind was not unbiassed as to the merits of the case; and that if he was sworn as a juror he would enter on the trial having an opinion as to the guilt of the defendant.

Juror Flowers testified, that he had heard what purported to be the facts in the case, and had both formed and expressed an opinion concerning the guilt or innocence of the defendant; that he had taken part in discussions concerning the facts of the case, and had expressed himself freely and pointedly in regard thereto; that his opinion was such that it would require evidence to remove it, and that he did not feel that he was wholly unbiased as regards the question of the guilt or innocence of the defendant.

The examinations of jurors Babcock, Decker, and Ford were not dissimilar. Each acknowledged having formed an opinion which was so far fixed that it would require evidence to remove it. Each of the jurors, however, after testifying substantially as above, were thought to qualify themselves by saying, in answer to leading questions put to them by counsel for the state and by the court, that they could, or believed that they could, try the defendant fairly and impartially on the law and evidence as it should be given them on the trial, disregarding their previously formed opinions; and it was because of such answers that challenges for actual bias interposed to them were overruled.

It seems to be conceded by the state that these jurors were subject to challenge for actual bias under the rule announced by the earlier decisions of this court, particularly by the cases of *Rose v. State*, 2 Wash. 310, 26 Pac. 264; *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *State v. Murphy*, 9 Wash. 204, 37 Pac. 420; and *State v. Wilcox*. 11 Wash. 215, 39 Pac. 368; but it was thought these cases had been modified by later decisions, and that jurors now, although having opinions on the merits of the controversy, who make answer that they can, or believe they can, disregard their preconceived opinions and try the case

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according to the law and the evidence, as it may be given them on the trial, are not to be deemed disqualified. The first of the cases relied upon as making this change is *State v. Royse*, 24 Wash. 440, 64 Pac. 742. But it is evident from what is said on pages 445 and 446 of the opinion, concerning the qualifications of the juror there thought to be disqualified, that no such ruling was intended. The court refers to the earlier cases, and points out the distinction between such earlier cases and the case then at bar, saying that it must appear, in order to make the earlier rule operative, that the juror has an opinion upon the question of the guilt or innocence of the defendant, and not a mere impression, as the juror then under discussion was shown to have had.

The same thing may be said of the cases of *State v. Boyce*, 24 Wash. 514, 64 Pac. 719, and *State v. Farris*, 26 Wash. 205, 66 Pac. 412. In the latter case, all of the former decisions of the court were cited, and it was pointed out specially that the answers of the juror in the case then before the court were not the same as in those cases where the answers were held to disqualify. *State v. Croney*, 31 Wash. 122, 71 Pac. 783, may more nearly support the state than any of the cases cited, but it is evident that the court did not, even in that case, intend to lay down the rule that jurors who had both formed and expressed an opinion upon the question of the guilt of the defendant were not subject to challenge for actual bias. This becomes evident when we recall what was said concerning the testimony of the juror to whom the challenge was interposed. Speaking of such testimony, the court said:

“The whole testimony of the juror shows that he did not intend to state that he had any fixed opinion in regard to what he had read of the matter, but that it was

simply an impression from such reading, without any knowledge of whether what he had read was the fact or not. The amount of credit given to newspaper accounts differs very largely with the individuals who read them, and yet it can scarcely be denied that some impression is made on the mind of every reader who gives time enough to an article to read it at all. But such an impression as this is not such an opinion as would disqualify a juror from passing upon the guilt or innocence of a defendant based upon the testimony adduced at the trial, under proper instructions by the court."

But in the case before us there is no escape from the conclusion that the several jurors had opinions, not impressions, on the question of the guilt of the defendant. These opinions were so far fixed that not only would evidence be required to remove them, but in some instances they had been expressed, and in others an actual bias against the defendant had been created. None of the cases from this court, even the most liberal, hold such jurors qualified. If a juror has an opinion as to the guilt or innocence of the defendant, in any given case, so far fixed that evidence would be required to remove it, he is disqualified as a juror in that case, notwithstanding he may answer that he can, or believes he can, disregard such opinion and try the case according to the law and the evidence that is given upon the trial. There are minds, doubtless, that are capable of laying aside preconceived ideas and opinions, and of arriving at conclusions from particular facts, disregarding and not considering others. But this is an attribute of mind that is acquired by special training and education, and is not an acquirement possessed by the ordinary jurymen.

We are of the opinion, therefore, that the appellant did not have a trial before a fair and impartial jury, such as is guaranteed to her by the constitution and laws, and that

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Citations of Counsel.

for this reason the judgment against her must be reversed and a new trial awarded.

The information upon which the appellant was convicted was sufficient both in form and substance. The other matters complained of need no special mention, as they will not recur on a retrial of the cause.

The judgment is reversed, and a new trial awarded.

HADLEY, MOUNT, ANDERS, and DUNBAR, JJ., concur.

[No. 5039. Decided December 30, 1904.]

*In the Matter of the Application of JAMES C. BROAD for
a Writ of Habeas Corpus.*

JAMES C. BROAD, Appellant, v. E. M. WOYDT, Chief of
Police of the City of Spokane, Respondent.¹

LABOR—PUBLIC WORKS—EIGHT-HOUR DAY—CONSTITUTIONAL LAW—RIGHT OF CONTRACT. An ordinance prescribing an eight-hour day, and forbidding the employment for longer hours of any laborer upon municipal construction work, making the same a part of all city contracts for such work, and providing a penalty for any violation thereof by any city contractor, is not unconstitutional as in conflict with the fourteenth amendment or any other federal or state constitutional provision, since the same relates only to public works, and the state has a right to do its work in any manner it sees fit, and no violation of private rights is involved.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered October 16, 1903, dismissing a petition for a writ of habeas corpus, upon sustaining a demurrer thereto. Affirmed.

Cullen & Dudley, for appellant, contended, *inter alia*, that the ordinance was unconstitutional on the ground that it interferes with the private right of contract. *See*

¹Reported in 78 Pac. 1004.

36	449
e37	400
f37	467
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attle v. Smyth, 22 Wash. 327, 60 Pac. 1120, 79 Am. St. 939; *Ex parte Kuback*, 85 Cal. 274, 24 Pac. 737; *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. 605, 52 L. R. A. 814; *Bertholf v. O'Reilly*, 74 N. Y. 515, 30 Am. Rep. 323; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313; *Cleveland v. Clements Bros. Const. Co.*, 67 Ohio St. 197, 65 N. E. 885, 93 Am. St. 670, 59 L. R. A. 775; *Commonwealth v. Perry*, 155 Mass. 117, 28 N. E. 1126, 31 Am. St. 533, 14 L. R. A. 325; *Low v. Rees Printing Co.*, 41 Neb. 127, 59 N. W. 362, 43 Am. St. 670, 24 L. R. A. 702; *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62, 37 Am. St. 206, 22 L. R. A. 340; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *Ramsey v. People*, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 25 Am. St. 863, 6 L. R. A. 621; *Leep v. St. Louis etc. R. Co.* 58 Ark. 407, 25 S. W. 75, 41 Am. St. 109, 23 L. R. A. 264; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; *In re Morgan*, 26 Col. 415, 58 Pac. 1071, 77 Am. St. 269, 47 L. R. A. 52; *Butchers Union etc. Co. v. Crescent City etc. Co.*, 111 U. S. 746, 4 Sup. Ct. 652. The ordinance is not within the police power of the state. 1 Tiedeman's State & Fed. Control of Per. & Prop., §§ 1-5; Cooley's Const. Lim., pp. 706-8 (5th ed.); *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. 465; Potter's Dwarrior on Stat. & Const. 458; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499; *State v. Noyes*, 47 Me. 189; *Austin v. Murray*, 16 Pick. 121; *People v. Jackson etc. Road Co.*, 9 Mich. 284; *People v. Orange County Road etc. Co.*, 175 N. Y. 84, 67 N. E. 129. It can not be sustained on the ground that it refers only to municipal work; it cre-

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ates a burden upon the citizen for the benefit of favored individuals. *Loan Asso. v. Topeka*, 20 Wall. 655; 2 Dillon, Munic. Corp., §§ 736-7 (3d ed.); Cooley, Taxation, 67-69, 76-80, 89, 90. It prevents the city from making the best terms possible in its contracts. *Atlanta v. Stein*, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; *Marshall & Bruce Co. v. Nashville*, 109 Tenn. 495, 71 S. W. 815; *People ex rel. Rodgers v. Coler*, *supra*; *Holden v. Alton*, 179 Ill. 318, 53 N. E. 556; *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314, 69 Am. St. 222, 42 L. R. A. 718; *Davenport v. Walker*, 68 N. Y. Supp. 161; *Berry v. Tacoma*, 12 Wash. 3, 40 Pac. 414; *Puget Sound Pub. Co. v. Times Printing Co.*, 33 Wash. 551, 74 Pac. 802. The following are parallel cases. *People ex rel. Rodgers v. Coler*, *People v. Orange County Road etc. Co.*, and *Cleveland v. Clements Bros. Const. Co.*, *supra*; *Street v. Varney Elec. Supply Co.*, 160 Ind. 338, 66 N. E. 895; *Fiske v. People*, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291; *Ex parte Kuback*, *supra*; *Frame v. Felix*, 167 Pa. St. 47, 31 Atl. 375, 27 L. R. A. 802.

E. O. Connor, for respondent.

DUNBAR, J.—This is an appeal from a judgment denying appellant's application for an order discharging him from custody, and remanding him to the custody of the chief of police. The appellant was arrested October 15, 1903, upon a warrant duly issued by the justice's court on a complaint charging appellant with violating ordinance No. A1114, as amended, of the ordinances of the city of Spokane. This ordinance, as passed January 7, 1902, was as follows:

"Ordinance No. A1114. An ordinance to establish the hours to constitute a day's work on all municipal construction, or such work done by contract or sub-contract,

and providing for the wages to be paid laborers employed in doing the same, and providing penalties for its violation.

"The City of Spokane does ordain as follows:

"§ 1. Hereafter eight hours in any calendar day shall constitute a day's work on any work done for the city of Spokane, subject to the conditions hereinafter provided.

"§ 2. Hereafter all laborers employed on municipal work, which is being done by contract or sub-contract, as in this ordinance specified, shall receive and be paid the sum of not less than two (\$2.00) dollars for a calendar day's work of eight hours, which sum of two (\$2.00) dollars shall be the minimum price paid to all day laborers hereafter employed to do the work hereinbelow specified.

"§ 3. All work done by contract or sub-contract on any building or improvements, or work on roads, bridges, streets, alleys, or buildings for the city of Spokane shall be done under the provisions of this ordinance: Provided, that in cases of extraordinary emergency, such as danger to life or property, the hours for work may be extended; but in such case the rate of pay for time employed in excess of eight hours of each calendar day shall be one and one-half times the rate of pay allowed for the same amount of time during eight hour's service. And for this purpose this ordinance is made a part of all contracts, sub-contracts or agreements for work done for the city of Spokane.

"§ 4. Any contractor, subcontractor or agent of contractor, foreman or employer, who shall violate the provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment in the city jail for a period not less than ten days nor more than ninety days, or both such fine and imprisonment, at the discretion of the court.

"§ 5. This ordinance shall take effect and be in force ten days after its passage."

The complaint charged that, on the 12th day of October, 1903, the petitioner, James C. Broad, in violation of said ordinance No. A1114, as amended, "did then and there

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unlawfully and wilfully permit one Martin Devereux to work and labor more than eight hours in one calendar day upon the Fourth Ward sewer system in the city of Spokane, Washington, which said work was being done upon said sewer for the city of Spokane, Washington, by said James C. Broad, under contract with the city of Spokane, Washington." A warrant for the arrest of petitioner was duly issued, and petitioner arrested. A writ of habeas corpus having been sued out, the respondent chief of police made return, setting up the complaint and warrant, and stating that, under and by virtue of said warrant, he held the petitioner in custody to appear and answer to said charge before the court. The petitioner duly excepted to the sufficiency of this return, upon the ground that the ordinance of the city of Spokane, under which the petitioner was held, was in conflict with the constitution of the United States, with the constitution and laws of the state of Washington, and was unreasonable. The court overruled the petitioner's exception to the sufficiency of the return, denied the petition, and ordered the petitioner remanded to the custody of the chief of police. From such order this appeal is taken.

The appellant makes several assignments of error, but they are all embraced in the proposition that the ordinance was in violation of the fourteenth amendment to the constitution of the United States, which provides that, "no state shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the law;" of § 3, art. 1, of the constitution of the state of Washington, which provides that, "no person shall be deprived of life, liberty or property without due pro-

cess of law;" of § 7, art. 1 of the state constitution, which provides that no person shall be disturbed in his private affairs or his home invaded without authority of law; of § 12, art. 1, which provides that no law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations; of §§ 5 and 9, art. 7, which provide, respectively, that "no tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied;" and "the legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same;" of § 7, art. 8, which provides that "no county, city, town or other municipal corporation shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in, or bonds of, any association, company or corporation;" of § 4683, Bal. Code, with reference to jurisdiction of justices of the peace in criminal prosecutions; and of chapter 44, of the laws of 1903, with relation to public work to be performed in working days of eight hours each.

The principal contention of the appellant is that the ordinance is in violation of the fourteenth amendment of the constitution of the United States, and of similar provisions of the state constitution. It is earnestly con-

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tended, and such is undoubtedly the general statement of the law by the reported cases, that the right to contract labor is a valuable right, and that any law that takes that right away is obnoxious to the constitutional provision prohibiting the taking of property without due process of law. These elementary propositions have been so often discussed that it is not necessary to again enter into their discussion here.

It is earnestly insisted by the appellant that this question has been decided by this court in the case of *Seattle v. Smyth*, 22 Wash. 327, 60 Pac. 1120, 79 Am. St. 939, and that, unless that case is directly overruled, the judgment in this must be reversed. It is true that this court, in the case above mentioned, did hold that a city ordinance which makes it unlawful for any contractor upon any of the public works of a city to require or permit any day laborer or mechanic to work more than eight hours in any one calendar day, is unconstitutional, on the ground that it interferes with the right of persons to contract with reference to their services, where such services are neither unlawful nor against public policy. This was a brief per curiam opinion. It was stated therein that we had not been cited to a single case wherein the constitutionality of such ordinances had been sustained, and a recurrence to the briefs in that case sustains this statement in the opinion. In fact, the brief of appellant did not discuss this question at all, but it appears that the court below sustained a demurrer to the complaint, on the ground that the ordinance was an enlargement upon the powers granted by the city charter to regulate the hours of labor of persons laboring upon public contract work of the city; and this was the only question that was discussed in appellant's brief. The unconstitutionality of the ordinance was briefly men-

tioned in respondent's brief, and some cases cited, notably the case of *In re Morgan*, 26 Colo. 415, 58 Pac. 1071, upon which the court seems to have based its decision. The Colorado case, however, has since been overruled, in principle, by this court in *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52.

The Colorado case is the radical type of cases holding such laws unconstitutional, and it held that laws of this character, even where they were made with reference to the health of the workmen employed, were in conflict with the constitution, and that, in the absence of a constitutional provision authorizing the legislature to single out workmen in underground mines and smelters, and restrict them as to the number of hours they shall work, such a law is unconstitutional as being class legislation; that it was not a valid exercise of police power to protect the public health, since the health of the miner alone, and not of the public at large, is its object. This case is in direct conflict with *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, where the provision in the Utah statute providing that the period of employment of workmen in all underground mines or workings shall be eight hours per day, except in cases of emergency, etc., was sustained as not being inimical to the provisions of the fourteenth amendment to the constitution of the United States, by abridging the privileges or immunities of its citizens or depriving them of their property, or denying to them the equal protection of the laws.

In the case at bar, the ordinance which was violated was substantially identical with the act of the legislature, Laws 1899, p. 163, which provides:

"§ 1. Hereafter eight hours in any calendar day shall constitute a day's work on any work done for the state or any county or municipality within the state subject to conditions hereinafter provided.

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"§ 2. All work done by contract or sub-contract on any building or improvements or works on roads, bridges, streets, alleys or buildings for the state or any county or municipality within the state, shall be done under the provisions of this act; Provided, That in cases of extraordinary emergency such as danger to life or property, the hours for work may be extended, but in such case the rate of pay for time employed in excess of eight hours of each calendar day, shall be one and one-half times the rate of pay allowed for the same amount of time during eight hours' service. And for this purpose this act is made a part of all contracts, sub-contracts or agreements for work done for the state or any county or municipality within the state.

"§ 3. Any contractor, sub-contractor, or agent of contractor or sub-contractor, foreman or employer who shall violate the provisions of this act, shall be deemed guilty of misdemeanor and upon conviction shall be fined in a sum not less than twenty-five dollars nor more than two hundred dollars, or with imprisonment in the county jail for a period of not less than ten days nor more than ninety days, or both such fine and imprisonment, at the discretion of the court."

In this case it is stipulated that the contract for the municipal work, under which it was charged that the petitioner had permitted one of his employees to work for more than eight hours in one calendar day, contained the following provision:

"It is further agreed that the laws of the state fixing the hours constituting a day's work, approved March 18, 1899, and ordinance No. A1114, passed January 7, 1902, shall be a part of this contract."

It is insisted by the respondent that it would be unconscionable to allow the contractor, after having entered into this contract and based his bid upon the provisions of the ordinance with reference to the number of hours that laborers under the contract should be allowed to work, to

appropriate to himself the benefits accruing from a violation of his own contract; and there seems to be some justice in this criticism, although in an action of this character it may not be a pertinent argument.

But, whatever may be said of the correctness of *Seattle v. Smyth*, *supra*, at the time it was rendered—and it may be conceded, we think, that a majority of the tribunals before which this question has been brought have pronounced such laws unconstitutional—yet the supreme court of the United States, in the recent case of *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148, decided May 1, 1903, have passed, with no uncertain sound, upon the identical question which is presented in this case, and have held the law to be valid. An examination of the Kansas statute, upon which the defendant Atkin was indicted, shows it to be, in substance, the same as our statute and the ordinance in question. The complaint charged that Atkin contracted with the municipal corporation of Kansas City to do labor on a certain boulevard, and, having hired one George Reese to shovel and remove dirt in execution of the work, did knowingly, wilfully, and unlawfully permit and require him to labor ten hours upon said work, there being no extraordinary emergency arising in time of war, nor any necessity for him to labor more than eight hours for the protection of property or of human life, the statute providing that employees should not work more than eight hours a day. And, as showing that there was no element of the health of the citizens involved in this case, it was stipulated that the labor performed by Reese was healthful outdoor work, not dangerous, hazardous, or in any way injurious to life, limb, or health, and could be performed for a period of ten hours during each working day of the week without injury from so doing, and that the labor he was employed

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to perform, and did perform, was in no respect or manner more dangerous to the health, or hazardous to life or limb or to the general welfare, of the said George Reese, or other persons doing such work, than the labor performed by persons doing the same kind of, or character of, work as the employees of contractors having contracts to do the same kind of work for private persons, firms, or corporations or as the servants of private persons, firms, or corporations. It was further stipulated that the work of shoveling and removing dirt for the construction of a pavement was, in all respects, the same whether the pavement be constructed for a city or other municipality, or for a private person, firm, or corporation. But the decision was based upon an entirely new theory of the law, namely, that it was a public work on which the contractor was engaged, and with reference to which he contracted; that the state, or the municipalities, through delegated powers from the state, had a right to do their work in any manner in which they saw fit, and that they had the same right to compel those with whom they contracted to perform the public work in the same manner, and that there was no question of violation of private right involved. In the discussion of the case, it is said:

"Whether a similar statute applied to laborers or employees in purely private work would be constitutional is a question of very large import, which we have no occasion now to determine or even to consider. Assuming that the statute has application only to labor or work performed by or on behalf of the state, or by or on behalf of a municipal corporation, the defendant contends that it is in conflict with the 14th Amendment. He insists that the Amendment guarantees to him the right to pursue any lawful calling, and to enter into all contracts that are proper, necessary, or essential to the prosecution

of such calling; and that the statute of Kansas unreasonably interferes with the exercise of that right."

And, after quoting the argument of counsel, the court says:

"These questions—indeed the entire argument of defendant's counsel—seem to attach too little consequence to the relation existing between a state and its municipal corporations. Such corporations are the creatures—mere political subdivisions—of the state, for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged or altogether withdrawn at the will of the legislature; the authority of the legislature when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed. . . . The improvement of the boulevard in question was a work of which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the state invested one of its governmental agencies with power to care for it. Whether done by the state directly or by one of its instrumentalities, the work was of a public, not private character. . . . whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work *for it or for one of its municipal agencies* should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regu-

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lations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do double work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern. If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best,—as undoubtedly it is,—and that to make it a criminal offense for a contractor for public work to permit or require his employee to perform labor upon that work in excess of eight hours each day is in derogation of the liberty both of employees and employer, it is sufficient to answer that no employee is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do."

It is a notable fact, in this connection, that the alleged constitutional right of the laborer to contract his labor at any price which seems to him desirable is not in this, or any other reported case, a claim urged by the laborer, but the earnest contention in his behalf is made by the contractors who are reaping the benefits of the violation of that contract in paying the laborer a less remuneration than he is entitled to under the statute. But, inasmuch as this is a case which is susceptible of being appealed to the supreme court of the United States, and inasmuch as that tribunal has passed squarely upon the questions involved in this case in favor of sustaining the judgment herein, this court feels it its duty to yield

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allegiance to the doctrine announced by the supreme court of the United States.

There seems to us to be no virtue in any of the other contentions made by the appellant. The title to the act is sufficient; the ordinance was made under the authority of the law; and, not being obnoxious to any constitutional provision, either of the United States or of the state, the judgment will be sustained.

FULLERTON, C. J., and ANDERS, MOUNT, and HADLEY, JJ., concur.

[No. 5164. Decided December 30, 1904.]

SEATTLE BREWING & MALTING COMPANY, *Respondent*,
v. WILLIAM JENSEN *et al.*, *Appellants*.¹

RECEIVERS — INJUNCTION — AGREEMENT TO SELL EXCLUSIVELY CERTAIN BEER — EVIDENCE OF SURRENDER OF AGREEMENT — SUFFICIENCY — FINDINGS NOT SUPPORTED BY PREPONDERANCE OF EVIDENCE — AFFIDAVITS. Where plaintiff, a brewing company, signed a lease of premises to be used for a restaurant and saloon, as surety for payment of the rent, in consideration of which the defendants, who were the actual tenants, agreed to use and sell exclusively the plaintiff's beer in the conduct of said business, in an action for a receiver brought by the plaintiff alleging it to be a half owner of the leased premises, and seeking an injunction against the sale by defendants of any beer other than plaintiff's beer, findings in favor of the plaintiff are not sustained, and there is no necessity for a receiver or an injunction, where it appears that the plaintiff had no interest in the lease, but signed as surety only, that money loaned by plaintiff to the defendants to fit up the place had been repaid, that the plaintiff was actuated by a vindictive spirit in bringing the suit, that defendants offered access to their books to show the amount of their sales of beer and offered security against damage thereby, and where it appears by a preponderance of the evidence (which was wholly by affidavits) that the plaintiff had surrendered its so-called beer contract in consideration of being released from liability as surety for the rent.

¹Reported in 78 Pac. 1007.

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Appeal from an order of the superior court for King county, Bell, J., entered June 12, 1904, after a hearing upon affidavits, appointing a receiver *pendente lite* and granting a temporary injunction, in an action to enjoin the sale by defendants of any other than plaintiff's beer. Reversed.

Ballinger, Ronald & Battle, for appellants.

G. M. Emory and Harold Preston, for respondent.

DUNBAR, J.—This was an action asking for equitable relief, viz., for a temporary injunction and for the appointment of a receiver *pendente lite*. The complaint alleges a contract, and sets forth as the basis of said contract the following written document, viz:

"This indenture, made this 20th day of March, 1901, by and between J. W. Clise and William Nottingham . . . parties of the first part, and William Jensen and Hulda Jensen, his wife, and the Seattle Brewing and Malting Company, jointly and severally, parties of the second part, Witnesseth: That the said parties of the first part do by these presents lease unto the said parties of the second part for restaurant and saloon purposes all the premises known as the Bismarck Cafe, for a period from the date hereof to the 31st day of December, 1906, at the monthly rental of five hundred dollars, payable on the first day of each month, in advance, together with all bills for heat, light, water and all repairs and other expenses incurred incident to the use and occupancy of said premises. . . . The said parties of the second part do hereby jointly and severally covenant and agree to pay the said parties of the first part the said rent for the full term of this lease, in the manner hereinbefore specified," etc.

It is alleged in the complaint, that, at the same time, and as a part of the same contract and transaction, the parties to this action entered into the following memorandum of agreement, viz:

"Memorandum of Agreement, made and entered into this 20th day of March, A. D. 1901, by and between the Seattle Brewing and Malting Company, a corporation etc., the party of the first part, and William Jensen and Hulda Jensen, his wife, parties of the second part, Witnesseth: Whereas the aforesaid first and second parties have jointly leased and rented from J. W. Clise and William Nottingham, through J. W. Clise, for himself and as the duly authorized agent of William Nottingham, by written lease bearing even date herewith, all that [being the same property described in the lease], for the term commencing with the completion of the premises and ending on the 31st day of December, 1906; and said second parties will conduct and carry on a restaurant, saloon and liquor business in said premises during the term of said lease; And whereas, one of the conditions upon which the lease of the said premises is jointly made with the parties of the first part and parties of the second part, was that the second parties should enter into and agree with the party of the first part, to purchase from the said first party exclusively all the beer sold or offered for sale in said premises during the term of the above lease; Now, therefore, in consideration of the premises, it is hereby mutually agreed by and between the parties hereto, as follows: First, all of the beer sold or offered for sale by the second parties in the carrying on of said saloon and restaurant business in the premises aforesaid during the term of said lease, shall be purchased from the party of the first part. (Signed and witnessed.)

It is further alleged in the complaint that, at the time of the execution of these instruments, it was mutually orally agreed that the plaintiff was to be the owner, entitled to the possession, of an undivided one-half, and the defendants to an undivided one-half, of the leasehold estate. It is also alleged, that, as a part of the same transaction, it was orally agreed that plaintiff would loan defendants, without interest, \$8,000, to be expended by defendants

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for the benefit of said leasehold estate in improving, decorating, etc., and that, by reason of the loaning of said \$8,000 the leasehold estate was rendered valuable to that extent; that it was mutually agreed, also, by said plaintiff and said defendants, at the time of entering into said agreement, as a part thereof, that the sole profits to be derived from said leasehold estate by said plaintiff should be the profits derived from the exclusive purchase from it, by defendants, of all the beer sold or offered for sale by them in said premises during the term of said lease; that the defendants conducted a prosperous business, in accordance with the agreement aforesaid, and complied with the beer contract until the month of December, 1903, to the benefit of the plaintiff in the sum of \$15 a day; that in December, 1903, the defendants, in violation of their contract and contrary to equity and good conscience, refused to purchase any beer whatever from said plaintiff, and still refuse to purchase it, now or in the future, but on the contrary are purchasing, and threaten to continue to purchase, large quantities, to wit, all the beer consumed, or to be consumed, sold, offered for sale, or to be sold or offered for sale, upon said leasehold premises; that it is impracticable to determine the amount of damages from the violation of the contract in an action at law, by reason of the fact that the profits arising from the sale of beer conflict greatly, now and at various times, by factors impossible for either plaintiff or defendants to foresee or control, such as the possible increase or decrease of the population, the changing of currents of travel, the condition of the weather, and the change of centers of population within said city of Seattle; together with the other ordinary allegations in such cases in relation to damages; alleges, also, that the defendants refuse to allow plaintiff to enjoy any of the

benefits arising from said lease, and have refused, and still refuse, to allow it to partake of any of the rights of possession secured thereby; and have refused, and still refuse, to allow it in any manner to share or partake in the increased value of said leasehold arising by reason of the furnishing of said money hereinbefore referred to; prays that a receiver of said leasehold and said business and all furniture, fixtures, appliances, or personal property in or about the conduct thereof, be appointed, and that an order issue enjoining and restraining defendants from further refusing to purchase from plaintiff all beer sold, or offered for sale, by them upon said premises, or from purchasing from any person other than plaintiff, for sale on said premises, and from selling thereon, and offering for sale thereon, any beer so purchased; and for general relief.

A demurrer was interposed to this complaint, to the effect that it failed to state facts sufficient to constitute a cause of action against the defendants, or to entitle the plaintiff to the relief in equity as prayed for, or for any relief in equity. The demurrer was overruled, and upon a trial of the cause a receiver was appointed, and a temporary injunction granted, in accordance with the prayer of the complaint. This cause was tried by the court upon affidavits alone. The first affidavit made by Sweeney, who is the agent of the respondent, sets forth, in substance, the matters and things set forth in the complaint. The appellants filed an answering affidavit, by appellant William Jensen, in which it was admitted that the agreements were executed as set forth in the complaint, but it is alleged, that it was the intention of the parties plaintiff and defendant that the plaintiff should not be a joint lessee with the defendants, but simply a surety; that one Blackistone had an option with Clise for

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the lease of these premises; that the defendants paid him \$250 for said option, and undertook to lease the premises from Clise and his principals; and that Clise demanded security, and that said security was furnished in the manner specified; that plaintiff has never assumed to have any interest in the leasehold estate; that it has never paid any part of the rent, which has always been paid by the defendants, and that it never claimed any other interest than the advantage which it would obtain by reason of the sales of its beer, which was to be used in the business conducted by the defendants; that defendants were unable to purchase beer, after the middle of December, of the brewing company, by reason of the fact that the unions in Seattle had pronounced the plaintiff company's beer unfair, and undertook to prohibit its sale; that defendants had employed, in their business in the cafe aforesaid, some seventy employees, all of whom belonged to the union, and all of whom threatened to strike, if defendants purchased said beer, and threatened to boycott the business of defendants, and defendants became satisfied that they could not conduct their business and that their business, which was a valuable one, would be absolutely destroyed if they yielded to the protestations of Sweeney and purchased his beer; that Sweeney, in the first place, tried to hire affiant to enter into his quarrel with the unions, by offering him a thousand dollars, and that afterwards, when he discovered this could not be done, he became enraged at the defendants, threatening to prevent them from buying beer of any other dealer; that he sued them without notice for the \$8,000 which had been loaned to them, and by them expended in furnishing and improving the leasehold interest, thereby causing them to pay not only the \$8,000 but \$300 attorney's fee, although a short time before the money

had been proffered to Sweeney, and he had told the defendants to keep it as the company was not in any need of it; that, in order to prevent trouble and litigation, while they did not consider themselves, for reasons hereinafter stated, bound upon the so-called contract, they offered to give the plaintiff a bond for the payment to it of any sum which might be found due it as damages for their failure to buy beer of it according to the alleged contract; that they offered to allow it to have access to their books, so that it could tell the amount of beer that was sold by them during the time that they did not purchase the beer of the plaintiff, and made every offer which was possibly within their power to make; that, after making one of these propositions to the attorney for the plaintiff, who said that he would submit it to Mr. Sweeney and let them know the result of the submission by ten o'clock the next morning, at about nine o'clock that evening affiant was rung up on the telephone by Sweeney, who said to him, in the following words: "I want you to understand about that settlement you are trying to make. I don't want no settlement. I am going to have a receiver in there if hell freezes over. I am going to draw every drop of blood out of you. I am going to take the last dollar from you." To which affiant answered, "Go at it, old boy," and hung up the telephone.

Sweeney, in a counter affidavit, denies using the language alleged in defendants' affidavit to have been used, but states in his own words what he said, which shows substantially the same revengeful spirit and inclination to injure the defendants, rather than to settle their difficulties. We speak of this only to show the apparent animus in the bringing of the action, which may, and ought, to a certain extent, guide the court in weighing the testi-

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mony in a cause like this where there is a plain conflict in the testimony.

It is also alleged, in defendants' affidavit, that Clise, desiring to obtain some concessions from these lessees, wanting a portion of the premises released to him for the purpose of building the foundation for a vault, entered into an agreement with the defendants and with Sweeney by which the plaintiff was to be released, it being stated in the affidavit of defendants that the plaintiff had objected to being further responsible on this lease; that Sweeney agreed to this proposition of Mr. Clise, and agreed to withdraw from the lease and allow the defendants to become the sole lessees, and also agreed that, in consideration of the release of the plaintiff, it would release the defendants from their beer contract. This is bitterly denied by Sweeney in an answering affidavit.

We are satisfied from the whole record that it never was the intention that the plaintiff should have any interest in the leasehold estate; that its true position, which was understood not only between plaintiff and defendants but between them and Clise, was that it was simply security for the carrying out of the lease; that it paid no attention to the lease, transacted none of the business, and was interested only in securing sales for its beer. In fact, it is stated in the affidavit of Sweeney that the plaintiff never claimed any other profit in the business than the profit which would arise from the sale of beer under the alleged beer contract. There is no testimony in the case that the leasehold interest has in any way been injured, or will be injured, or that any property in connection with it has been or will be dissipated.

The allegations in relation to the furnishing of the \$8,000 are met by the uncontradicted affidavit that said money had since been paid, and there cannot, in any

event, be any reason for the appointment of a receiver to look after the leasehold interest. It is conceded that, under the agreement, the defendants have a right to use such leasehold interest exclusively, and there is nothing to show that it is being used contrary to any of the conditions agreed upon, excepting in the matter of the purchase of the beer. This contract in relation to the beer was an exceedingly loose one, there being no price stipulated for the payment of the beer, not even that the market price should be paid therefor. But, conceding, without deciding, that the market price was the price which was understood at the time of the execution of the contract, according to the affidavit of the defendants this contract was abrogated and annulled, and the defendants released by agreement with Sweeney. The following affidavit of Mr. Clise seems to put this question beyond a peradventure, and throws some light upon the whole transaction. It is as follows:

"J. W. Clise, being first duly sworn, upon oath deposes and says: That prior to the execution of the lease mentioned in the plaintiff's complaint herein, he required of the defendants security; that the result of said requirement was the making of the lease to the plaintiff and defendants jointly; that thereafter, the owners of the premises desired the surrender of a small portion of said premises for the purpose of constructing the foundation for a vault for a bank which was to occupy a room on the floor above; that the defendant William Jensen refused under any circumstances or upon any conditions for a while, to surrender possession of the part desired by the owners of the premises; that E. F. Sweeney, manager of the plaintiff, never claimed to affiant that he owned or controlled any part of the leasehold interest or of the business carried on by the defendants, and he has at times stated to affiant that he did not control said matters; plaintiff has never paid any of the rent; that all

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rentals for said premises have been paid by the defendants; that the said Sweeney was willing for the owners to have possession of that portion of the leased premises required for the purpose of constructing said vault as aforesaid, but informed affiant that he could not dictate to or control defendants Jensen; that thereupon defendant William Jensen stated to affiant that if affiant would release plaintiff from any liability as surety on account of said lease, and procure the release of the defendants from any obligation to plaintiff he, said Jensen, would surrender to the owners the portion of the premises desired for the construction of said vault. Thereupon affiant sought and met Mr. Sweeney in the office of L. C. Gilman, an attorney-at-law, and after stating the fact as aforesaid to said Sweeney affiant asked said Sweeney if he, Sweeney, would release defendant from his so-called beer contract providing the defendant would surrender to the owners the premises desired as aforesaid; that Mr. Sweeney answered in the affirmative, and agreed to do so; that affiant relying upon the promises of the said Sweeney communicated the same to the said defendants Jensen, and then and there entered into a written agreement with Jensen, a copy of which is hereto attached; that the new lease has never been made, but that the said Jensen is in possession not only of the premises covered by the old lease, but also the additional room mentioned in said contract, and has been paying therefor the sum of \$285.00 per month."

The agreement, which was entered into after the understanding with Clise and Sweeney, is an agreement providing for the dismissal of a certain suit which Clise had brought for the purpose of recovering a certain portion of the leased premises, Jensen agreeing that he would permit said Clise to construct a vault, and Clise agreeing to pay Jensen \$40 a month compensation therefor, for the life of the lease, and Clise agreeing to co-operate with Jensen to the best of his ability to obtain from the city council permission to construct a stairway from Madi-

son street to the premises occupied by Jensen. This affidavit of Mr. Clise is denied absolutely in an answering affidavit of Sweeney, and an affidavit was furnished by attorney Gilman in some sense disputing the affidavit of Clise, though we do not regard it as the intention of Mr. Gilman to state any more than his knowledge on the subject, which was to the effect that he had heard some of the conversations between Sweeney and Clise in his office, although he does not say that he heard all of them, or that he heard the particular one which was referred to by Mr. Clise. But concerning the talks generally over the business, he says this: "Affiant does not remember that the said Sweeney stated in said conversation that he would release the interest of plaintiff in said lease, and affiant is certain that said Sweeney did not state that he would be willing to release the beer contract of the plaintiff;" and then proceeds to say that he had advised his client Sweeney that, if he released the lease contract, it would probably work the release of the beer contract.

This case was tried on affidavits alone, where there was no opportunity for cross-examination or explanation. The affidavits of the defendant Jensen and Sweeney cannot be reconciled. Mr. Clise, who so far as we can gather from this record is a disinterested witness, states positively that the understanding was reached with Sweeney as agent for the plaintiff, and communicated by him to Jensen; that the lease was given up by plaintiff, and that the defendants were released from their beer contract. This positive statement is in reality not disputed by the affidavit of Gilman, because his statement is only to the effect that he does not recollect certain statements, but it is not shown that he was in a position where he would take notice or recollect the statements alleged to have been made. From the affidavits, as they appear in the

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record, we think the weight of the testimony is with the defendants, and that the plaintiff has failed to establish any right to equitable relief.

The judgment will be reversed and the cause dismissed.

FULLERTON, C. J., and ANDERS, MOUNT, and HADLEY, JJ., concur.

[No. 4921. Decided December 30, 1904.]

36	473
36	558
36	473
37	522
38	351

G. H. OVINGTON *et al.*, Respondents, v. THE AETNA INDEMNITY COMPANY, Appellant.¹

INDEMNITY—INSURANCE—BOND GUARANTEEING BUILDING CONTRACT—NOTICE OF ACTS INVOLVING LOSS—CONSTRUCTION—RELEASE OF SURETY. An indemnity bond or policy guaranteeing the performance of a building contract, which stipulates that notice must be given the surety of any act on the part of the contractor which may involve a loss, does not require the giving of notice that the contractor has failed to pay the employees, and a notice given as soon as the claimants sought to make their claims charges against the property is in time to prevent the discharge of the surety.

INDEMNITY—BUILDING CONTRACT—ACTION ON BOND—ACCRUAL—DATE OF FIRST BREACH—DELAY IN COMPLETION OF BUILDING. Where an indemnity bond, guaranteeing a building contract, provided that actions thereon must be instituted within six months after the first breach of the contract, and the owner accepted the building after delay in its completion, the surety cannot claim that the right of action on the bond was barred six months after the time specified in the contract for the completion of the building, since the surety cannot complain of waiver of any breach of the contract by the owner's acceptance of the building, when such waiver did not operate to the prejudice of the surety.

SAME—ALTERATION IN CONTRACT INCREASING COST OF BUILDING—RELEASE OF SURETY. The surety in an indemnity bond guaranteeing a building contract is not released by reason of the fact that changes were made in the plans as the work progressed, increasing the cost of the building, where the building contract provided that such changes might be made.

¹Reported in 78 Pac. 1021.

Appeal from a judgment of the superior court for King county, Hatch, J., entered July 24, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon an indemnity bond. Affirmed.

Root, Palmer & Brown, for appellant.

Ira Bronson, for respondents.

FULLERTON, C. J.—In May 1902 the respondents entered into a contract in writing with one B. Colling, by the terms of which Colling agreed to furnish all of the necessary labor and material, and erect, for the respondents, a dwelling house, according to plans and specifications therein specially mentioned and described. The consideration for the construction of the building was \$3,300. The contract also provided that Colling should furnish a bond in the sum of \$2,000, to secure the faithful performance of the contract on his part. Following out this requirement of the contract, the contractor procured the appellant to become his surety, paying it therefor a cash consideration called a premium. The bond given recited, in general terms, the execution of the contract between the respondent and Colling, and contained a general condition to the effect that it was to be void in case Colling should well, truly, and faithfully comply with such conditions, otherwise to remain in full force and effect. The general condition, however, was subject to a number of provisos, among which were the following:

“Provided, that the said surety shall be notified in writing of any act on the part of the said principal, his agent or employees, which may involve a loss for which said surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of the fully authorized representative or representatives of George H. Ovington and wife who shall have the super-

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vision of the completion of said contract; and a registered letter mailed to the office of Clemens & O'Bryan, Manager of the Aetna Indemnity Company, at Portland, Oregon, shall be deemed sufficient notice within the meaning of this bond. . . . And Provided further: that any suit at law or proceedings in equity brought against this bond to recover any claim hereunder, must be instituted within six months after the first breach of said contract."

By the terms of the contract the dwelling was to have been completed within 120 days from the 12th day of May, 1902. It was in fact completed about the 1st of December of that year. Shortly after its completion, numerous liens were filed against the building and the land on which it was situate, by laborers and material-men, to secure themselves for labor and material furnished the contractor, and used in the construction of the building. Some of these liens were afterwards prosecuted to judgment, and became fixed charges against the respondents' property. The respondents thereupon instituted this action against the appellant to recover the amount of such liens, and afterwards recovered a judgment for the sum of \$1,865.14. This appeal is from that judgment.

It appears from the evidence, and the trial court found, that as early as September, following the execution of the contract, the respondents were notified by two persons who had performed labor on the building that their wages for such services, amounting to some \$25 each, had not been paid by the contractor. The respondents did not notify the bond company of this fact, and it is contended by the company now that this prevented a recovery on the bond, because being a breach of that condition providing that notice should be given it of any act on the part of the contractor which might involve a loss for which it, as surety, was responsible under the terms of the bond. It seems to us, however, that this cannot be the meaning of

this clause of the bond. To give it that construction is to say that the contract forbids the incurring of any indebtedness by the contractor for the construction of the building. If the contractor should buy a keg of nails, a load of lumber, employ a person to labor upon the building, or in fact do anything looking to the erection of the building, without paying for the particular article or service in advance, it would be an act on the part of the contractor which might involve a loss for which the surety would be responsible under the terms of the bond, and, of course, if known to the owner or his representative, would require the owner to give notice thereof, in order to prevent the discharge of the surety. But it is evident that this is not what the parties to the contract contemplated. The obligation on the part of the contractor to furnish the necessary material and labor to complete the building, means, as between the contractor and owner, that the contractor will not suffer the cost of such material and labor to become a charge upon the property of the owner, and, until they do become such a charge, there is no obligation on the part of the owner to pay for them, and hence no right of recovery against the surety. The owner cannot know, from the mere fact that the contractor has used his credit in the purchase of labor or material for the construction of the building, that the cost of the same will be made a charge against his property. He knows that fact only when legal steps are taken to make the cost such a charge, and, as the primary purpose of the bond is to secure to the owner the faithful performance of the contract on the part of the contractor, its language must receive a reasonable construction to that end. It must be given the usual and ordinary meaning the language would have when considered with reference to the subject-matter under consideration, and the evident

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purpose and intent of the parties. To say that it means that the owner must give notice of every act of the contractor which may, by some remote possibility, ripen into a charge against the property, is not to follow this rule; it is to give it a construction subversive of its purpose, making the bond a trap for the unwary rather than a business like attempt to furnish security for a very common undertaking. As the owner notified the surety of those claims as soon as the claimants sought to make their claims charges against his property, we hold the notification to have been in time to prevent the discharge of the surety.

The appellant next complains that the action was not commenced in time, because not commenced within six months of the time the contractor agreed to complete the building, but this question was met and determined adversely to this contention in the case of *Beebe v. Redward*, 35 Wash. 615, 77 Pac. 1052, and reference is made to that case for the reasons upon which the conclusion is rested.

The appellant next complains that the trial court erred in refusing to permit him to show that changes were made in the original plans of the building, as the work progressed, entailing an additional cost to the contractor of some \$400, but we find no error in this. The contract itself provided in terms that such changes might be made, and of course the possibility of such changes must have been in the contemplation of the surety at the time it entered into the bond. The fact that the unpaid obligations of the contractor may have been increased because of such changes does not affect the case, as increase of costs was as much contemplated and provided for by the contract as were decreases in the cost of construction.

The judgment appealed from is affirmed.

HADLEY, MOUNT, ANDERS, and DUNBAR, JJ., concur.

[No. 5067. Decided December 30, 1904.]

*In the Matter of the Estate of PAUL DRASDO, Deceased.*¹

ADMINISTRATORS AND EXECUTORS—ALLOWANCE TO WIDOW—RIGHT OF WIDOW NOT AFFECTED BY IMMORAL LIFE—WILL DISOWNING WIFE. The right of a widow, who has been left but one dollar by the testator's will, to have set apart to her the widow's exemptions and an allowance during the settlement of the estate, is not affected by the fact that she visited and associated with prostitutes, where it appears that the deceased met and married her at a house of ill-fame, and associated with and invited her former associates to his home, and she merely pursued the ways he evidently desired her to pursue.

SAME—AMOUNT OF ALLOWANCE TO WIDOW—REASONABLENESS. An allowance of \$250 per month during the settlement of an estate, made to a widow who has been cut off by the testator with a bequest of one dollar, is not excessive where the estate was worth \$50,000, producing a monthly income of over \$1,500, and there were no minor heirs or direct descendants, nor any creditors.

Appeal by the executors of a will from an order of the superior court for King county, Bell, J., in probate, entered October 28, 1903, setting apart the household goods and personal effects, and making an allowance to the widow during the administration of an estate. Affirmed.

William Martin and *W. A. Keene*, for appellants. Construing the statute for a "reasonable" allowance to the widow so as to effect the purpose for which it was enacted, the widow was not entitled to any part of the estate. *Prater v. Prater*, 87 Tenn. 78, 9 S. W. 361; *Richard v. Lazard*, 108 La. 540, 32 South. 559; *Earle v. Earle*, 9 Tex. 630; *Odiorne's Appeal*, 54 Pa. St. 175.

C. H. Farrell, for respondent. The widow was entitled to the allowance notwithstanding her acts. *Mowser v. Mowser*, 87 Mo. 437; *Chase v. Webster*, 168 Mass.

¹Reported in 78 Pac. 1022.

25	476
26	436
27	427
28	504

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228, 46 N. E. 705; *Walters v. Jordan*, 12 Ired. (N. C.) 170; *In re Diller's Application*, 5 Ohio N. P. 255; *King v. King*, 64 Mo. App. 301; *Zeigler v. Mize*, 132 Ind. 403, 31 N. E. 945; *Griesmer v. Boyer*, 13 Wash. 171, 43 Pac. 17; *Smith v. Smith*, 112 Ga. 351, 37 S. E. 407; *Linares v. De Linares*, 93 Tex. 84, 53 S. W. 579; *In re Gorkow's Estate*, 20 Wash. 563, 56 Pac. 385; *In re Lax Estate* (Cal.), 35 Pac. 341.

FULLERTON, C. J.—This is an appeal from an order in probate. The record discloses that one Paul Drasdo died on the 15th day of June 1903, in King county, this state, leaving an estate therein consisting of personal property of the approximate value of \$50,000. The decedent left a will in which he disclaimed having any lawful wife, but provided that in case "any woman should prove to the satisfaction of any court, and establish in any court, by decree or otherwise, that she is, or has ever been," his lawful wife, he bequeathed to her the sum of one dollar. All the residue of his estate was bequeathed to collateral heirs. Dora Marsh Drasdo, claiming to be the widow of the deceased, applied to the court for an order setting apart to her certain personal property, as being exempt from execution, and for an allowance out of the estate for her support pending the settlement of the same. On the hearing the court found that the applicant was the widow of the decedent, having been his lawful wife at the time of his death, and as such was entitled to have set apart to her the household goods, furniture, wearing apparel and personal effects of her late husband, and also to an allowance of two hundred and fifty dollars per month for her support and maintenance during the progress of the settlement of the estate, and entered an order accordingly. From this order the executors named in the will appeal.

The appellants do not, in this court, seriously contend that the applicant was not the wife of the decedent, Drasdo, at the time of his death, but they contend that, because of her dissolute and immoral acts and character, she has forfeited all rights as his widow, and is not entitled to any of the benefits accruing to her under the law as such.

It was shown, by the testimony of certain persons engaged in hack driving in the city of Seattle, that she had been driven by them, at times by herself, and at other times in company with a man other than her husband, to a house of prostitution in that city, and that once she made the "rounds of the saloons," drinking at the different places she entered; and by her own testimony it was shown that she visited an acquaintance at a house of ill-fame in the city of Chicago, while she was on a trip to the eastern states. But it also appeared that the Chicago house was one that she was an inmate of prior to coming to Seattle, and that the Seattle house was one that she was an inmate of at the time, and from which, the deceased married her. She denied visiting the Seattle house in company with any man other than her husband, and denied that she had ever made the rounds of the saloons. It was also shown that her husband had knowledge of her past life before he married her.

If it be true that conduct on the part of a wife, such as is charged against the respondent, would, in any case, be held sufficient to deprive her of her rights as a widow, we think the rule can have no application in this case. It was not to be expected that the applicant would, after her marriage, entirely sever herself from her old associations. Nor, if we may believe the testimony of the applicant, did the husband expect it. One of her former associates was invited as a witness to the wedding ceremony,

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and signed the return filed in the county clerk's office as such witness. The wedding was celebrated by a supper in the house it is now thought improper for the wife to visit, at which celebration the husband spent some five hundred dollars for wine alone. He invited and brought to his house women from this very house on several occasions, and often invited and took its inmates, in company with his wife, to the races, theatre, and other public places. These are not, of course, things that a wife in a virtuous household could submit to and escape with impunity, but this woman is not to be measured by the standard of a woman in a virtuous household. She but continued to be what she was known to be when the decedent married her; her acts were the acts that won her husband, and she but pursued the ways he evidently desired her to pursue. This being true, his legatees cannot cut her off from her rights as a widow by showing that her ways were not the ways of continence and sobriety.

The appellants complain of the allowances made the applicant, claiming that they are excessive. It seems to us however, in view of the circumstances, that they are not so. In making such allowances the court may take into consideration the character and amount of the estate left, and the provision the husband sought to make for the benefit of the widow, as well as her actual necessities. Here the deceased sought to cut his widow off with one dollar. He denied in his will that their very marriage was legal. He left estate of the value of \$50,000, which produced an income of over \$1,500 per month. There are no minor heirs or direct descendants to inherit the property, nor are there any creditors of the estate. Under these circumstances, we think the allowances are not excessive, and the order appealed from will be affirmed.

HADLEY, MOUNT, ANDERS, and DUNBAR, JJ., concur.

[No. 5344. Decided December 30, 1904.]

THE STATE OF WASHINGTON, *Respondent*, v. SAM EDER,
Appellant.¹

CRIMINAL LAW—EVIDENCE OF OTHER CRIMES—IMPEACHMENT OF WITNESS—ATTEMPT TO CORRECT INADVERTENT STATEMENTS OF WIFE. It is reversible error to permit the state, upon cross-examination of the accused's wife, to show that the accused had been convicted of another crime some years before, and it is not a sufficient excuse that the same was shown to correct the statement that she had married the accused about the year 1898, at which time he was in prison, the same being an inadvertence, she having married him in 1899.

SAME—CREDIBILITY OF WITNESS—IMPEACHMENT OF WIFE OF ACCUSED BY FACT OF FORMER CONVICTION. It is not permissible, on the cross-examination of the accused's wife, for the state to show that the accused had been convicted of another crime some years before, and before their marriage, in order to affect the credibility of the wife, since the fact tends directly to prejudice the accused, and only remotely, if at all, to discredit the witness.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered December 12, 1903, upon a trial and conviction of the crime of robbery. Reversed.

Del Cary Smith and *A. J. Laughon*, for appellant.

Horace Kimball and *R. M. Barnhart*, for respondent.

FULLERTON, C. J.—The appellant was convicted of the crime of robbery, and sentenced to a term of ten years in the state penitentiary. From the judgment of conviction and sentence, he appeals to this court.

The crime charged in the information was committed on the 4th day of April, 1903. After the state had closed its case, the appellant called as a witness one Florence Eder, who testified, in answer to questions put to her by

¹Reported in 78 Pac. 1023.

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counsel, that she was the wife of the appellant, and that the appellant was with her at Little Spokane, some 18 miles from the scene of the robbery, from the evening of the 2nd to the morning of the 5th or 6th of April, where he had been summoned at what was supposed to be the deathbed of his father. On cross-examination, the state was permitted to show by the witness that the appellant had been confined, for another crime, in the state penitentiary, some five or six years prior to the time of the crime charged in the information. This action of the court constitutes the first error assigned.

The state concedes that to admit evidence of a separate and distinct crime from that charged in the information is, in general, reversible error, but they seek to justify its admission in this instance on the principle that the evidence tended to impeach the witness, and contend that impeaching evidence is permissible, even though it does tend to connect the defendant with another and distinct crime. But without determining whether this contention would be true in any case, we are clear that it has no application here. The first question asked the witness on cross-examination was, "When were you married to this defendant?" To which the witness answered: "I don't remember exactly—about 1898;" while the fact was, as she testified subsequently, she was married in 1899. It was to correct this inadvertence on her part that the state was permitted to show by her that the defendant was confined in the state penitentiary in 1898; the argument being that, if he was so confined, she could not have lawfully married him at the time stated. But this did not justify a departure from the rule. In all the appellate courts, at the present day, evidence that the defendant has been guilty of a separate and distinct crime from that for which he is being tried, when offered for the purpose of

aiding the conviction of the defendant, is held inadmissible, and reversible error when admitted over proper objection.

The rule is founded in reason. The defendant comes to the trial prepared to meet only the crime with which he is accused, and he cannot, from the nature of things, be prepared to defend against other crimes that may be charged against him. Moreover, it is not the policy of the law to convict a man of one crime by showing that he has, at some time, been guilty of another. As testimony of the kind mentioned establishes the bad character of the defendant, its inevitable effect is to prejudice the minds of the jury against him, causing them to find him guilty of the crime charged on doubtful evidence, or evidence that would not otherwise produce a conviction. It violates, also, another well settled rule of criminal jurisprudence, namely, it permits the state to attack the character of the defendant when he does not himself put his character in issue.

The rule being thus founded in justice, it should not be departed from, except under conditions which clearly justify such a departure. There was no sufficient reason for the departure shown here. The answer of the witness was clearly an inadvertence, given without any possible purpose to deceive, and to correct her statement did not call for the admission of the objectionable evidence. Moreover, if correction was material at all, it could have been done in other ways than by bringing to the attention of the jury this particular fact.

It is said, however, that it affected the credibility of the witness to show that she had married a man who had been confined in the penitentiary; but this, again, is a consequence too remote to authorize the admission of objectionable evidence. While it is sometimes stated that

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any circumstance which tends, in the remotest degree, to affect the credibility of a witness can be shown on cross-examination of such witness, yet the rule is not without exception. The fact shown must have a tendency to accomplish the purpose intended, and must not be something which of itself tends directly to prejudice the defendant in the minds of the jury. A defendant can be prejudiced, of course, by showing that his witness is unworthy of belief, but the state cannot, under the guise of impeaching a witness, show facts which tend directly to prejudice the defendant, but which only remotely, if at all, discredit the witness.

A further contention is that the evidence was insufficient to justify the verdict and that the cause should be reversed with instructions to discharge the appellant. But on this question we have no hesitancy in saying that the legitimate evidence makes a case for the determination of the jury.

The judgment is reversed, and the cause remanded for a new trial.

HADLEY, MOUNT, DUNBAR, and ANDERS, JJ., concur.

[No. 5216. Decided December 30, 1904.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHNNY
WASHING, *Appellant*.¹

CRIMINAL LAW—CONFESSIONS—STATEMENTS MADE BEFORE COMMITTING MAGISTRATE—VOLUNTARY, ALTHOUGH ACCUSED NOT INFORMED OF HIS RIGHT TO REFUSE TO ANSWER. It is not error to receive, as a voluntary confession, evidence of statements made by an Indian before a committing magistrate, upon being charged with horse stealing, in answer to questions put by the magistrate, although he was not represented by counsel and was not informed of his right to refuse to answer, where, in

¹Reported in 78 Pac. 1019.

answer to the question whether he stole the horse, he answered that he had not and volunteered, "I brand him," and other statements followed whereby he attempted to explain his acts, since enough appears to show, *prima facie*, that the statements were voluntary.

LARCENY—VALUE OF HORSE STOLEN—INSTRUCTIONS AS TO VALUE. It being unnecessary, under Bal. Code, § 7113, to allege the value of stolen cattle, if of any value, it is not error to refuse to instruct the jury with reference to the value of a stolen horse, when it appears without dispute that it was valuable.

Appeal from a judgment of the superior court for Kittitas county, A. L. Miller, J., entered December 11, 1903, upon a trial and conviction of the crime of horse stealing. Affirmed.

H. Dustin, for appellant, cited *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496, 57 Am. Rep. 709; *Teachout v. People*, 41 N. Y. 9; *Crowder v. State*, 28 Tex. App. 51, 11 S. W. 835, 19 Am. St. 811; *Nolen v. State*, 14 Tex. App. 474, 46 Am. Rep. 247; *People v. Gastro*, 75 Mich. 127, 42 N. W. 937; *Young v. State*, 50 Ark. 501, 8 S. W. 828; *Ellis v. State*, 65 Miss. 44, 3 South. 188, 7 Am. St. 634.

E. C. Ward and *W. B. Presby*, for respondent, cited, *United States v. Stone*, 8 Fed. 232; *Beckham v. State*, 100 Ala. 15, 14 South. 859; 3 Am. & Eng. Ency. Law (1st ed.), 472; *People v. Ramirez*, 56 Cal. 533, 38 Am. Rep. 73; *People v. Abbott* (Cal.), 4 Pac. 769; *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357; *Carroll v. State*, 23 Ala. 28, 58 Am. Dec. 282; *State v. Briggs*, 68 Iowa 416, 27 N. W. 358; *Wilson v. United States*, 162 U. S. 613, 16 Sup. Ct. 895.

MOUNT, J.—Appellant was convicted of the crime of horse stealing, under the provisions of § 7113, Bal. Code. Two principal errors are alleged on this appeal, viz: (1)

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that the trial court erred in admitting in evidence certain statements of the appellant at the preliminary examination before the committing magistrate; and (2) that the court erred in refusing to instruct the jury that the horse stolen must be found to be of some value. The other errors alleged depend upon the two stated.

The appellant is an Indian, and speaks the English language in a broken manner. He and another Indian by the name of Tumwater were first charged jointly with the crime. Both were arrested and brought before a justice of the peace for a preliminary examination, and, being arraigned by the justice, who was sitting as a committing magistrate, the following proceedings were had, as shown by the record: The magistrate, addressing appellant, said:

“‘You are charged by this complaint with stealing and driving away a horse of M. P. Fuhman. Now, what have you to say as to that?’ The defendant not answering this question readily, the said justice of the peace said to him: ‘Did you steal this colt?’ (describing it to him). The defendant answered, ‘I no steal him. I brand him.’ And being further questioned by the said justice of the peace, said he did not know whose colt it was, but thought it belonged to a white man a long way off; said white man branded ‘slick-ears’ and he branded this colt; that the Indian Tumwater had nothing to do with it; that he first put Tumwater’s brand on the colt, and then let it run about two weeks, and then put his own brand on it; that he kept the colt in a field for a time, and then turned it out on the range. Being questioned as to whether he drove the colt away, the defendant said that he did not drive the colt away; that the colt followed him from Harrison Ridge in Klickitat county to the reservation.”

After the appellant had given this testimony, his co-defendant Tumwater was discharged, and appellant was bound over to appear for trial in the superior court of Kittitas county. At the preliminary hearing the appel-

lant was not attended by counsel, and was not informed by the magistrate as to his right to answer or refuse to answer questions propounded to him, or that such answers or statements might be used against him on the trial in the superior court. When the trial took place in the superior court, the prosecution was allowed to prove, by the magistrate and other witnesses, the statement above set out. This is alleged as error.

Our statute, at § 6942, Bal. Code, provides that:

"The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony."

The constitution provides, at § 9 of art. 1, that:

No person shall be compelled in any criminal case to give evidence against himself."

There was corroborating evidence in the case to the effect, that, upon the day the horse was stolen, the defendant and other Indians passed the place where the horse was kept; that shortly thereafter the horse was missed; that the horse was found in appellant's possession on the reservation some time thereafter and that appellant claimed to own the horse. So that the question now is, were the statements of the appellant before the committing magistrate made voluntarily? No evidence was offered by the appellant at the trial. He insists that the circumstances surrounding the preliminary examination, as shown by the prosecution, are sufficient to show that the statements were made involuntarily, and therefore should have been excluded. There is nothing in the record before us tending to show that the statements of the appellant were involuntary, except the mere fact that the appellant was before the magistrate upon pre-

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liminary hearing, and was asked the question, "Did you steal this colt?" Appellant was not required by the statute to plead to the charge in this preliminary examination, but it was his privilege to confess the charge if he desired to do so. Evidently when the magistrate asked the question, "Did you steal this colt?" he desired a direct answer, yes, or no. Appellant answered, "I no steal him. I brand him." The latter part of this answer was not responsive to the question asked, and no doubt led to the balance of the statement. The record does not contain the questions subsequently asked by the magistrate, but does contain the substance of the statement of the appellant. If the appellant had been informed of his rights to refuse to answer questions tending to criminate him, or if he was aware of those rights, it would be manifest that all the statements made subsequent to the answer, "I no steal him" were voluntary. In the case of *Wilson v. United States*, 162 U. S. 613, 16 Sup. Ct. 895, a case in principle the same as the one before us, the supreme court of the United States, speaking to this question, say, at page 623:

"In short, the test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort. The same rule that the confession must be voluntary is applied to cases where the accused has been examined before a magistrate, in the course of which examination the confession is made, as allowed and restricted by statute in England and in this country in many of the states. Gr. Ev. § 224. But it is held that there is a well defined distinction between an examination when the person testifies as a witness and when he is examined as a party accused; *People v. Mondon*, 103 N. Y. 211; *State v. Garvey*, 25 La. Ann. 191; and that where the accused is sworn, any confession he may make is deprived of its voluntary character, though there is a contrariety of opinion on this point. Gr. Ev. § 225; *State v. Gilman*, 51 Maine 215; *Commonwealth v. Clark*, 130 Penn. St. 641;

People v. Kelley, 47 California 125. The fact that he is in custody and manacled does not necessarily render his statement involuntary, nor is that necessarily the effect of popular excitement shortly preceding. *Sparf v. United States*, 156 U. S. 51; *Pierce v. United States*, 160 U. S. 355; *State v. Gorham*, 67 Vermont 365; *State v. Ingram*, 16 Kansas 14. And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned. *Joy on Confessions*, *45, *48, and cases cited. In the case at bar defendant was not put under oath, and made no objection to answering the questions propounded. The commissioner testified that the statement was made freely and voluntarily, and no evidence to the contrary was adduced. Nor did defendant when testifying on his own behalf testify to the contrary. He testified merely that the commissioner examined him 'without giving him the benefit of counsel or warning him of his right of being represented by counsel, or in any way informing him of his right to be thus represented.' He did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. His answers were explanations, and he appeared not to be unwilling to avail himself of that mode of averting suspicion. It is true that, while he was not sworn, he made the statement before a commissioner who was investigating a charge against him, as he was informed; he was in custody but not in irons; there had been threats of mobbing him the night before the examination; he did not have the aid of counsel; and he was not warned that he need not answer. These were matters which went to the weight or credibility of what he said of an incriminating character, but as he was not confessing guilt but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as matter of law."

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See, also, *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357; *State v. Briggs*, 68 Iowa 416, 27 N. W. 358.

Usually the admissibility of evidence is a question for the court to decide as a matter of law. In this class of cases, when it appears to the court that the admissions or confessions are involuntary, they should be excluded.

"When there is a conflict of evidence as to whether the confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant." *Wilson v. United States, supra*.

We think there was enough in this case to show *prima facie* that the statements of the appellant were made voluntarily, and it was therefore not error to submit the evidence to the jury

Upon the question of the instruction, this court, in the case of *State v. Young*, 13 Wash. 584, 43 Pac. 881, held that an allegation of value, in an information filed under this statute, was an immaterial and unnecessary averment. We desire to adhere to the rule therein announced. It follows that it was unnecessary for the court to give any instruction in regard to the particular value of the horse. The evidence showed without dispute that the horse in question was valuable. That is all that was necessary.

There is no error in the record, and the judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

[No. 5104. Decided December 30, 1904.]

NORTHWESTERN LUMBER COMPANY, *Appellant*, v. ELISHA S. CALLENDAR, *et al.*, *Respondents*.¹

FRAUD—SALE OF MACHINERY AND PATENT RIGHTS—RESCISSION FOR FRAUD OF VENDOR—VENDEE'S RIGHT TO RELY UPON REPRESENTATIONS. In an action on a promissory note given as part payment for the purchase price of certain machinery and patent rights for the manufacture of boxes, in which the defense was made that the sale was induced by the false and fraudulent representations of the vendor, findings for the defendants, supported by the evidence, will not be disturbed on appeal on the theory that the vendees made their own investigation before the purchase, since the representations of a vendor, familiar with machinery, amount to a warranty, when relied upon by purchasers unfamiliar therewith, and who are induced to purchase by such representations.

Appeal from a judgment of the superior court for Yakima county, Rudkin, J., entered July 15, 1903, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action upon a note and mortgage. Affirmed.

Jones & Guthrie and *Whitson & Parker*, for appellant, contended, among other things, that the rule in relation to the purchase of patent rights is different from the rule upon the purchase of machinery. A valid patent, without regard to its pecuniary value, is sufficient consideration for a promissory note given for the purchase price. *Myers v. Turner*, 17 Ill. 179; *Hildreth v. Turner*, 17 Ill. 184; *Wilson v. Hentges*, 26 Minn. 288, 3 N. W. 338; *Nash v. Lull*, 102 Mass. 60, 3 Am. Rep. 435; *Howe v. Richards*, 102 Mass. 64; *Van Norman v. Barbeau*, 54 Minn. 388, 55 N. W. 1112; *Fair v. Shelton*, 128 N. C. 105, 38 S. E. 290; *Tod v. Wick Bros. & Co.*, 36 Ohio St. 370; *Davis v. Gray*,

¹Reported in 79 Pac. 30.

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Citations of Counsel.

17 Ohio St. 330; *McKinzie v. Bailie*, 7 Ohio Dec. 607; *Crowe v. Eichinger*, 34 Ind. 65; *Cansler v. Eaton*, 55 N. C. 499; *Rockafellow v. Baker*, 41 Pa. St. 319, 80 Am. Dec. 624 (a case squarely in point); *Hunter v. McLaughlin*, 43 Ind. 38. The answer set up failure of consideration, not want of consideration; the defense of want of consideration, relied upon, is not established where the vendee gets all he contracted for. Am. & Eng. Ency. Law, p. 780 (2d ed.); *Baker v. Roberts*, 14 Ind. 552; *Williamson v. Hitner*, 79 Ind. 233; *Chicago etc. R. Co. v. Derkes*, 103 Ind. 520, 3 N. E. 239; *Scott v. Scott*, 105 Ind. 584, 5 N. E. 397; *Johnston v. Smith*, 86 N. C. 498; *Detrick v. McGlone*, 46 Ind. 291. Fraud is not established where the representations were honestly believed to be true. Benjamin, Sales (3d Am. ed.), § 429; *Cooper v. Lovering*, 106 Mass. 79; *Brown v. Castles*, 11 Cush. 351; *Russell v. Clark*, 7 Cranch 69; *Dilworth v. Bradner*, 85 Pa. St. 238; *Duff v. Williams*, 85 Pa. St. 490; *Eldridge v. Young Am. Min. Co.*, 27 Wash. 297, 67 Pac. 703. A design to deceive must be proved by other evidence than the mere fact that the representations were not true. *McDonald v. Trafton*, 15 Me. 225; *McKown v. Furgason*, 47 Iowa 636.

Frank D. Nash, for respondents, upon the point that the representations constituted fraud, whether or not they were knowingly made or intentionally false, cited: *Grosh v. Ivanhoe Land etc. Co.*, 95 Va. 161, 27 S. E. 841; *Riggs v. Thorpe*, 67 Minn. 217, 69 N. W. 891; *Beetle v. Anderson*, 98 Wis. 5, 73 N. W. 560; *Baum v. Holton*, 4 Colo. App. 406, 36 Pac. 154; *Carter v. Cole* (Tex. Civ. App.), 42 S. W. 369; *Braley v. Powers*, 92 Me. 203, 42 Atl. 362; *Litchfield v. Hutchinson*, 117 Mass. 195; *Foulks Accelerating etc. Co. v. Theis*, 26 Nev. 158, 65 Pac. 373; *Fargo*

Gas & Coke Co. v. Fargo Gas & Elec. Co., 4 N. D. 219, 59 N. W. 1066; *Stewart v. Wyoming Cattle Rancho Co.*, 128 U. S. 383, 9 Sup. Ct. 101.

PER CURIAM.—The plaintiff brought its action in the superior court of Yakima county, to recover a judgment on a note for \$3,000, dated October 1, 1892, executed by the defendant E. S. Callendar, payable to the order of Albert T. Linderman, with interest at eight per cent, and to foreclose a mortgage executed by the defendants Elisha and Clara J. Callendar, on certain lots in North Yakima, given to secure the same. Plaintiff held by assignment from Linderman. Defendants answered separately, all of them placing in issue the execution of the note, the giving of the mortgage, and the payment of certain taxes upon the mortgaged property. Certain questions are discussed in this case, with relation to the responsibility of the defendant Clara J. Callendar, and the substitution of one note for another, which, with the view we take of the main question on its merits, it is not necessary to decide.

The defendant Elisha S. Callendar affirmatively pleaded, that in the year 1892, and on or about August 18, the said Linderman, claiming to be the owner and patentee of certain patents for certain improvements in making packing boxes, and in machines for making said boxes, and corner fasteners for the same, entered into an agreement with the said Callendar and one C. W. Whedon, who contemplated engaging in the business of manufacturing boxes at Tacoma, by the terms of which said Linderman was to sell, and Callendar and Whedon and one Charles A. Wood were to buy, the exclusive right to the use of the machinery and improvements, and to manufacture the boxes, in Washington, Oregon, California, and

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Alaska, the interest of Wood being held in trust for one O. C. Fenlason; that the consideration of the sale was the sum of \$25,000, to be paid by Whedon and Callendar; that to induce them to enter into the agreement, Linderman, at the time of its execution and prior thereto, falsely represented to the said defendants that the boxes would be lighter in weight than boxes made by any other methods; that the cost of manufacture would be one-third to one-half less than the cost of boxes manufactured by the usual methods; that they would be stronger and firmer than boxes made by the ordinary methods, and by the use of the corner fastener invented, boxes could be made quicker and be firmer than boxes made by the ordinary methods; that they would be suitable for the commercial trade; and, relying upon the said representations, and being unfamiliar with the business of manufacturing boxes themselves, they entered into the agreement to purchase the right to the use of said machinery and improvements and inventions in the territory aforesaid; that, in pursuance of the agreement, said defendants paid said Linderman the sum of \$7,000 in cash; that other payments were made; that Callendar, as a payment on the balance owed by him, executed a promissory note for \$3,000, which is the note sued upon.

The pleadings and the arguments of counsel and the testimony in this case go very circumstantially into the description of these boxes, but it is sufficient to say that it was the claim of the defendant that the machinery purchased would not make the character of box which Linderman represented that it would make, and that, after great expense, in addition to the purchase price, in attempting to manufacture a merchantable box, the enterprise was abandoned. This, in substance, is the issue upon which the cause was tried. There can be no question

from the testimony that the character of box which was intended to be manufactured could not be manufactured by the machinery purchased; so that the whole question relates to the character of the representations made by Linderman, and the motives which induced the purchase on the part of the defendant—in other words, whether he purchased upon the representations made by Linderman, or upon investigations set on foot by himself.

The court found that, to induce the defendant Callendar to purchase the right to manufacture and sell said boxes and use said machinery and inventions, said Linderman, at and before the execution of said contract of sale of said patents and rights, represented to said Whedon and said Elisha S. Callendar that he had thoroughly tested said machinery and fastener invented by him—it may be said here that the principal controversy is over the metallic fastener which was to fasten the box without the use of nails—and that said machinery would, when said fastener was folded over, make a firm grip and hold the parts firmly in position; and that such representations were false, in that the parts would not fit closely and perfectly together, and in other respects more minutely set forth in the findings of fact; also found that Linderman represented that such box would be lighter in weight, and more quickly made than other boxes, but found that such box could not be made quicker than, or as quickly as, other boxes made in the usual manner; that they could not be made to cost one-third to one-half less than boxes made in the usual way, and could not be made at any less cost; that said boxes could not be used over and again, but, on the contrary, could not be used at all, as when put together the parts could not be made to fit; that they were not firm and strong, and were totally unfit for trade and commercial purposes, and when put together were weak

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and wobbly and wholly unsalable, and that said machinery was fatally and inherently defective, and could not be made to produce a perfect or salable box; that said Linderman devised and invented said machinery and improvements and corner fasteners for the express purpose of manufacturing said boxes; that he was a practical mechanic, familiar with all parts of said machinery; that neither defendant Elisha S. Callendar, nor said Charles W. Whedon, was familiar with machinery, and they had no knowledge, or means of knowing, how said machinery would work, except the representations of said Linderman; that said Elisha S. Callendar relied upon the statements and representations made by said Linderman, and, if such representations had not been made, he would not have entered into said agreement and purchased such rights and inventions; that, so relying, he entered into the contract and executed the note and mortgage sued upon. Other findings were made to the same effect. And as conclusions of law, it was found that plaintiff was not entitled to a judgment against any of the defendants upon the note or demand in suit; was not entitled to a decree foreclosing the mortgage set out in the amended complaint; that defendants were entitled to a decree dismissing this action, and adjudging that the note and mortgage described and set out in the amended complaint, and the claim and demand of plaintiff, were void and of no legal force; that the same were given without any legal consideration therefor, and did not constitute a lien upon the premises described in said mortgage; that said mortgage be discharged of record. It was further found that defendant Savings Investment Union was the owner of the premises described in said mortgage, free and clear of the lien of said mortgage. It should have been said in the statement that the defendant Savings Investment

Union, a corporation, had become a subsequent purchaser of the land mortgaged. It was also found, as a conclusion of law, that plaintiff was entitled to have the sum of \$479.50, together with interest thereon from the 18th day of May, 1899, at the rate of six per cent per annum, paid to it on account of taxes paid by it on said property on the 18th day of May, 1899, and a decree was entered in accordance with the aforesaid findings and conclusions.

We have given particular attention to the testimony in this case, for it is a character of case upon which it is difficult to reach a determination. It is earnestly contended by the appellant that the respondent Callendar made this purchase, not upon the representation of Linderman, but upon an examination of the machinery made by himself and Fenlason, a man of some skill in mechanics and a practical box maker, who accompanied him to the factory of Linderman, where the sale was made. But, from an examination of all the testimony in the case, we are unable to say that the findings made by the trial judge were not borne out and supported by the testimony, and that, had it not been for the enthusiastic representations made by Linderman, this defendant, at least would not have made the purchase. It is unnecessary to cite authorities in this case, for it has already been established by this court, in accordance with the great weight of authority, in *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414, that where one who is not familiar with machinery is dealing with one who is, the representations of the seller amount to a warranty of the machinery, whether so intended by him or not, if the purchaser relied on such statements as a warranty and was induced thereby to make the purchase.

The findings of fact being justified by the testimony, and the conclusions of law being justified by the findings of fact, the judgment is affirmed.

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[No. 5316. Decided December 30, 1904.]

JOHN ESMOND *et al.*, *Appellants*, v. GILLIES LOGGING AND
MERCANTILE COMPANY, *Respondent*.¹

CONTRACTS—AGREEMENT FOR SECURITY OF PARTIES FURNISHING SUPPLIES TO LOGGING CAMP—CONSTRUCTION. Where plaintiffs furnished supplies to a logger, cutting timber upon the lands of, and under contract with, the defendant company, until about two thousand dollars was due them, when, for the purpose of security, a written agreement was entered into whereby the logger authorized the defendant company to pay the "labor claims incurred" in cutting "said timber," and certain other specified amounts, and authorized the payment of any balance, due the logger under the contract, to the plaintiffs from month to month, until their claims were paid, the deduction for the labor claims is not to be confined to current claims, but comprehends all claims for such labor, and does not render the defendant company personally liable, except to the extent of the balance due the logger remaining in its hands.

SAME. In such case it is not error to receive evidence of the amount of the labor claims incurred and advanced by the defendant company prior to the making of such contract, since they were comprehended therein, and there was no intention to place the defendant in a worse position than it was in before making the contract.

APPEAL—REVIEW. Findings will not be disturbed when sustained by the evidence.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered July 14, 1904, upon findings in favor of the defendants, dismissing, on the merits, an action upon contract, after a trial before the court without a jury. Affirmed.

B. G. Cheney, for appellants.

J. B. Bridges, for respondent.

HADLEY, J.—This suit is for the recovery of sums alleged to be due for supplies furnished to a logging camp.

¹Reported in 78 Pac. 1016.

The firms of Esmond & Esmond and Ninemire & Morgan joined in the action as plaintiffs, and brought the suit against Daniel Gillies and the Gillies Logging & Mercantile Company, a corporation, as defendants. The complaint alleges, that on the 6th day of September, 1902, the said Daniel Gillies entered into an agreement in writing with his co-defendant, the above named corporation, under the terms of which said Gillies agreed to cut and remove the merchantable timber upon certain lands in Chehalis county, belonging to said corporation, and that the latter agreed to pay him certain prices per thousand feet, as specified in the contract, for such cutting and removal; that thereafter said Gillies entered upon the performance of the contract, and that, for the purpose of enabling him to carry out the same, he from time to time obtained from the plaintiffs certain supplies; that payments were made for a portion of the supplies, none of which were made by said Gillies directly, but that all were made by said corporation, and that the latter agreed to pay for them all; that on the 27th day of March, 1903, there was due and owing from the defendants to said firm of Esmond & Esmond the sum of \$1,559.15, and to the firm of Ninemire & Morgan the sum of \$481.01, aggregating in all the sum of \$2,040.16; that on said date the plaintiffs refused to furnish further supplies unless said indebtedness was paid or secured, and that, as security for said indebtedness, and in consideration of obtaining further supplies from the plaintiffs, and to secure the payment therefor, the defendants entered into an agreement in writing with the plaintiffs as follows:

"Whereas Daniel Gillies has contracted with the Gillies Logging & Mercantile Company to cut, log and remove certain timber upon Little North river, and said company in consideration thereof heretofore agreed to

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pay him for such services the sum of \$3.50 per thousand feet for all fir and spruce timber cut and removed under said contract, and placed in its boom in Preachers Slough, of which amount \$2.50 per thousand feet is to be paid when said logs are put in the waters of Little North river; and, whereas, under said contract the company is authorized to pay the labor claims against said logs; and, whereas, the said Daniel Gillies is indebted to Esmond & Esmond of Montesano, for supplies and merchandise in the sum of \$1,559.15, and is indebted to Ninemire & Morgan in the sum of \$481.01, and will hereafter become indebted to each of said firms on account of merchandise and supplies furnished; and, whereas, the parties are desirous that said Esmond & Esmond and Ninemire & Morgan shall be secured for said indebtedness and for future indebtedness to be incurred.

"It is therefore agreed, by said Daniel Gillies and said Gillies Logging & Mercantile Company, and said Esmond & Esmond and said Ninemire & Morgan as follows: Said Daniel Gillies hereby authorizes said Gillies Logging & Mercantile Company out of said \$3.50 per M feet to pay the actual labor claims incurred in cutting, removing and logging said timber, or getting said logs into said slough, and authorizes said company to pay to the persons entitled thereto a sum of money not exceeding \$250 for any month in payment for bills for cable, steel, coal and necessary camp equipment and other proper expenses in running said camp, it being understood that no more than said sum of \$250 for any month shall be used for that purpose and also an additional sum of \$75 per month for wages to said Gillies will be allowed. The said Daniel Gillies hereby authorizes said company, and said company hereby agrees to pay to said Esmond & Esmond and said Ninemire & Morgan all of the balance remaining from month to month, owing to said Gillies under said contract, until the indebtedness now owing to said Esmond & Esmond and said Ninemire & Morgan and the indebtedness hereinafter incurred shall be fully paid.

"It is further agreed that said Daniel Gillies shall render monthly statement to said Esmond & Esmond and to

said Ninemire & Morgan of the amount of logs put into the waters of Little North river for each respective month, and the amount of logs put into Preachers Slough for each respective month, and the amount of labor claims against said logs, and the amount of bills incurred for each respective month on account of the purchase of cable, steel, coal and other necessary camp equipment."

It is further alleged that, after the making of the above contract, the plaintiffs continued to furnish supplies, for all of which said corporation paid, until on or about October 1, 1903, when it notified plaintiffs that it would not pay for any further supplies, and also refused to pay any part of said sum of \$2,040.16. It is averred that there is in the hands of the defendant corporation a sum of money greatly in excess of plaintiffs' claims, after allowing all deductions provided by said contract with plaintiffs, and judgment is demanded for \$2,040.16. The defendant corporation answered separately, its co-defendant Daniel Gillies defaulting. The answer admits the contract hereinbefore set out, and alleges that, after making the deductions for payments therein provided, no sum remains in its hands to be applied upon the claims of the plaintiffs. It denies any promise to pay plaintiffs except that contained in said written contract of March 27, 1903. The cause was tried before the court without a jury, and resulted in a judgment dismissing the action as against the defendant corporation. Plaintiffs have appealed.

If the respondent is liable here it must be by virtue of the written contract with appellants noted above. The appellants' complaint shows that the supplies were not furnished to, or purchased by, respondent, but that they were furnished to Daniel Gillies, who had a contract with respondent to cut and remove timber. Respondent cannot, therefore, be made liable unless there exists an

enforcible promise to answer for the debt of Daniel Gillies. The complaint, it is true, alleges an express promise to pay on the part of respondent, but it is not alleged that such promise was in writing, other than as contained in the contract which is set out above. The real controversy, therefore, is over the interpretation that shall be given to said written contract with appellants.

It will be observed that the said contract recognizes the existence of a prior one between Gillies and the logging company, whereby Gillies was to receive \$3.50 per thousand feet for all timber placed in respondent's boom in Preachers Slough, of which the sum of \$2.50 per thousand feet was to be paid when the logs were placed in the waters of Little North river. It is claimed by appellants that the contract with them contains a promise to pay the indebtedness owing to them, and theretofore incurred by Gillies, out of any balance remaining from what may be coming to him from respondent, for all timber placed in the water, at the rates above named, after making the deductions specified in the contract. And it is further claimed that such deductions relate only to current labor claims and expenses thereafter to accrue.

Respondent, upon the other hand, urges that the contract does not specify such deductions as relating to current labor and expenses thereafter to accrue, but that it comprehends a deduction of the amount necessary to pay all claims for labor in putting all the timber in the water, from the beginning of Gillies' operations under his contract. The trial court adopted the latter interpretation, and we think it was correct under the wording of the contract.

The language used does not, in terms, refer to current labor claims and expenses thereafter to accrue, but

it comprehensively says, "the actual labor claims incurred in cutting, removing and logging said timber." The words "said timber" must refer to the timber Gillies was to cut and remove under his contract, and cannot be said to refer alone to what should be thereafter cut and removed. The logging company, by its contract with Gillies, was authorized to pay the labor claims, and it was thus protected in such advancements to the extent, at least, of what should be coming to Gillies for logs actually placed in the water. It therefore seems manifest to us that it was not intended by the contract with appellants to place the logging company in a worse position than it was in before, whereby it might become liable for greater sums than those provided by the logging contract. It rather seems to have been intended, merely, to bind the logging company to pay to appellants, to the extent of their claims, any balances remaining in its hands under the logging contract, instead of paying the same to Gillies. It was in effect an order, made by Gillies upon respondent, to pay certain balances, which order was accepted by respondent.

It is assigned that the court erred in admitting evidence as to any indebtedness existing between Gillies and the respondent at the date of the aforesaid contract with appellants, and incurred prior thereto. It is the position of appellants that such evidence was immaterial, for the alleged reason that the contract does not authorize taking into account indebtedness for labor claims theretofore accrued. The purpose of the testimony was to show that respondent had, before the time of said contract, advanced large sums to Gillies, which had been applied upon payment of labor claims in his behalf, and that respondent is entitled to be reimbursed to the extent thereof, for the reason that the contract

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Opinion Per HALLEY, J.

with appellants provides that labor claims shall be first paid. Under the interpretation given to the contract below, and also by this court as hereinbefore stated, it authorizes the payment first of all labor claims from the beginning of Gillies' logging contract with respondent, and including all claims thereafter accruing. The contract states, upon its face, that, under respondent's logging contract with Gillies, it was "authorized to pay the labor claims against said logs." If, then, it made such payments to the laborers directly as their claims accrued, it became in effect an assignee of their claims, and was entitled to be substituted in their places, and receive the payments provided by the contract with appellants. It therefore became material to ascertain the extent of respondent's advancements, and also the amount of logs placed in the water, in order to determine whether respondent was still indebted to Gillies under its logging contract with him, and, if so, what amount still remained in its hands that could be applied to appellants' claims. We therefore think the court did not err in admitting the testimony.

Errors are assigned upon the findings of the court. The court found that the advancements made by the respondent to Gillies were for the payment of labor and certain camp expenses, the larger part being for payment of labor. It was also found that the advances far exceeded the amounts coming to Gillies under his logging contract. The conclusion was, therefore, reached that nothing remains in respondent's hands to be applied upon appellants' claims. The evidence is such as we think sustains the findings, and we shall therefore not disturb them.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, ANDERS, and DUNBAR, JJ., concur.

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[No. 5022. Decided December 31, 1904.]

JOE DOTTA, *Appellant*, v. NORTHERN PACIFIC RAIL-
WAY COMPANY *et al.*, *Respondents*.¹

RAILROADS—NEGLIGENCE—RIGHT OF WAY—INJURY TO PEDES-
TRAIN ON TRESTLE—WHEN A TRESPASSER. Where railroad com-
panies constructed a trestle over the tide flats, for a side and
storage track, upon which no planks were laid for foot pas-
sengers, and which was unusually narrow and with gaps at the
sides by reason of missing ends of ties, so that it was difficult
of passage and seldom used when cars were stored thereon,
although such track furnished a convenient way from a city
street to the manufacturing plants on the water front, and was,
when not obstructed by cars, extensively used for that purpose
without any objection being made by the railroads, a right
of way along the track is not acquired by user, and one who
attempts to use it while occupied by cars, which he tries to
pass, is a trespasser; and when such person is injured before
being discovered by trainmen coupling the cars, the company is
not liable for failure to keep a lookout, as for a licensee, and
a nonsuit is properly directed.

SAME—DOCTRINE OF LAST CLEAR CHANCE. In such a case the
doctrine of the "Last clear chance" has no application since the
defendants had no knowledge that movement of the cars would
result in injury to the plaintiff.

Appeal from a judgment of the superior court for King
county, Griffin, J., entered June 29, 1903, upon with-
drawing the case from the jury at the close of plaintiff's
evidence, in an action for injuries sustained by a pedes-
trian upon a railroad trestle. Affirmed.

Carkeek & Childe (John T. Condon, of counsel), for
appellant. Where the public has been in the habit of
using the tracks of a railroad company as a pathway,
the company owes the obligation to maintain a lookout,
especially when backing trains on the tracks. *Whalen*
v. Chicago etc. R. Co., 75 Wis. 654, 44 N. W. 849;

¹Reported in 79 Pac. 32.

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Citations of Counsel.

Lampkin v. McCormick, 105 La. 418, 29 South. 952, 83 Am. St. 245; *Reifsnyder v. Chicago etc. R. Co.*, 90 Iowa 76, 57 N. W. 692; *Hamilton v. Morgan etc. Co.*, 42 La. Ann. 824, 8 South. 586; *South & North Ala. R. Co. v. Donovan*, 84 Ala. 141, 4 South. 142; *Pickett v. Wilmington etc. R. Co.*, 117 N. C. 616, 23 S. E. 264, 53 Am. St. 611, 30 L. R. A. 257; *Cameron v. Union Trunk Line*, 10 Wash. 507, 39 Pac. 128; *Malstrom v. Northern Pac. R. Co.*, 20 Wash. 195, 55 Pac. 38; *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820. And the bell must be rung continually. *Whiton v. Chicago etc. R. Co.*, Fed. Cases, 17,597; *Texas etc. R. Co. v. Watkins* (Tex.), 26 S. W. 760; *Morgan v. Wabash R. Co.*, 159 Mo. 262, 60 S. W. 195. It is not contributory negligence *per se* to go on a railroad trestle. *Troy v. Cape Fear etc. R. Co.*, 99 N. C. 298, 6 S. E. 77, 6 Am. St. 521; *Mitchell v. Tacoma R. & Motor Co.*, 13 Wash. 560, 43 Pac. 528; *Frazer Adm. v. South & North Ala. R. Co.*, 81 Ala. 185, 1 South. 85, 60 Am. Rep. 145; *Redford v. Spokane etc. R. Co.*, 15 Wash. 419, 46 Pac. 650. Nor was plaintiff guilty of contributory negligence as a matter of fact. *Whiton v. Chicago etc. R. Co.*, *supra*; *Chisholm v. Seattle Elec. Co.*, 27 Wash. 237, 67 Pac. 601. The doctrine of the "Last clear chance" originated in the case of *Davies v. Mann*, 10 M. & W. 546. This is a mere development of the doctrine of remote and proximate cause. *Roberts v. Spokane St. R. Co.*, 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184. Upon the doctrine of the "Last clear chance" the defendant was liable. 55 Central Law Journal p. 289; Shearman & Redfield, Negligence (5th ed.), §§ 99, 100; Patterson, Railway Accident Law, p. 51. The following are a few of the leading cases on the "Last clear chance." *Bogan v. Carolina Cent. R. Co.*, 129 N. C. 154, 39 S. E. 808,

55 L. R. A. 418; *Davies v. Mann*, *supra*; *Morgan v. Wabash R. Co.*, 159 Mo. 262, 60 S. W. 195; *Tully v. Philadelphia etc. R. Co.*, 2 (Penn.) Del. 537, 47 Atl. 1019, 82 Am. St. 425; *Crowley v. Louisville etc. R. Co.*, 21 Ky. Law 1434, 55 S. W. 434; *Cincinnati etc. R. Co. v. Kassen*, 49 Ohio St. 230, 31 N. E. 282, 16 L. R. A. 674; *Grand Trunk Ry. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. The doctrine is approved in the following cases, and it is always a question of fact for the jury and not of law for the court. *Frazer v. South etc. R. Co.*, 81 Ala. 185, 1 South. 85, 60 Am. Rep. 145; *Meeks v. Southern Pac. R. Co.*, 56 Cal. 513, 38 Am. Rep. 67; *Fox v. Oakland etc. R. Co.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. 216; *Isbell v. New York etc. R. Co.*, 27 Conn. 393, 71 Am. Dec. 78; *Oliver v. Denver Tramway Co.*, 13 Colo. App. 543, 59 Pac. 79; *Bullard v. Southern R. Co.*, 116 Ga. 644, 43 S. E. 39; *Chicago etc. R. Co. v. Ryan*, 131 Ill. 474, 23 N. E. 385; *Neet v. Burlington etc. R. Co.*, 106 Iowa 248, 76 N. W. 677; *Lampkin v. McCormick*, 105 La. 418, 29 South. 952, 83 Am. St. 245; *Atwood v. Bangor etc. R. Co.*, 91 Me. 399, 40 Atl. 67; *Baltimore Consol. R. Co. v. Rifcowitz*, 89 Md. 338, 43 Atl. 762; *Bunting v. Central Pac. R. Co.*, 16 Nev. 277; *Felch v. Concord R. Co.*, 66 N. H. 318, 29 Atl. 557; *Patton v. East Tenn. R. Co.*, 89 Tenn. 370, 15 S. W. 919, 12 L. R. A. 184; *Law v. Missouri etc. R. Co.*, 29 Tex. Civ. App. 134, 67 S. W. 1025; *Shaw v. Salt Lake City R. Co.*, 21 Utah 76, 59 Pac. 552; *Virginia etc. R. Co. v. White*, 84 Va. 498, 5 S. E. 573; *Redford v. Spokane etc. R. Co.*, *supra*; *Malstrom v. Northern Pac. R. Co.*, *supra*; *Roberts v. Spokane St. R. Co.*, *supra*; *Inland etc. Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Louisville etc. R. Co. v. Tennessee R. Co.*, 60 Fed. 993; *Texas etc. R. Co. v.*

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Nolan, 62 Fed. 552; *Baltimore etc. R. Co. v. Anderson*, 85 Fed. 413; *Baltimore etc. R. Co. v. Hellenthal*, 88 Fed. 116; *Radley v. London R. Co.*, 1 App. Cases, 754. There is certainly room for reasonable men to draw different conclusions as to the negligence of the defendant and the contributory negligence of the plaintiff, or as to the proximate cause of the injury. *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799; *Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888; *Nelson v. Willey Steamship etc. Co.*, 26 Wash. 548, 67 Pac. 237; *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820; *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214; *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357; *Goe v. Northern Pac. R. Co.*, 30 Wash. 654, 71 Pac. 182.

James F. McElroy, B. S. Grosscup, and Piles, Donworth & Howe, for respondents.

FULLETON, C. J.—This is an action for personal injuries. From the record it appears that the respondent the Columbia & Puget Sound Railroad Company had constructed a railroad track extending from First Avenue South, in the city of Seattle, eastward between Dearborn and Charles Streets to the main terminal tracks of the Northern Pacific Railway Company, which was used by the latter company as a switching track, and a track upon which it occasionally stored or left its cars. The track was constructed originally on a trestle over the waters of Elliott Bay, and stood some 18 or 20 feet above the water at low tide, but the space had been filled in, from time to time, underneath the track, until the distance was somewhat lessened, averaging perhaps twelve feet at the time of the appellant's injury, which happened on the 25th day of June, 1902. The track, when not obstructed with cars, furnished a convenient way for those

desiring to pass to and from First Avenue South to the water front, and was extensively used for that purpose, particularly by the employees of several large manufacturing plants situated on the water front. The respondents, although they seem not to have forbidden the use of the trestle by pedestrians, did not invite or encourage travel over it by the manner of its construction. It was made unusually narrow—so narrow, in fact, that, when cars were standing upon it, there was but a very small space beside the cars and the ends of the ties along which a footman could pass, and this was made more difficult of passage by the occasional insertion of short ties, which left gaps in the way, from three to five feet wide, which had to be crossed. Because of its peculiar construction it was known locally as the "slim track." No planks were laid upon it, either between the rails or elsewhere, over which a person could walk, and while it was shown that it was freely used as a passage way when clear, it appeared that it was very seldom that any one crossed over it when cars were standing upon it. Neither of the respondent companies had forbidden, in any public manner, the use of the track as a passage way, nor did they maintain lookouts or guards to warn pedestrians of the times it was going to be put into use by themselves.

On the afternoon of the day above mentioned, the appellant, desiring to cross from First Avenue South to the water front, started over this trestle. At that time it contained several cars, the one closest to him being a large furniture car taking up almost the entire width of the trestle. Beyond it, and towards the Northern Pacific's main track, were several coal cars. When the appellant reached the furniture car, he climbed upon it, and walked its full length along the top, when, seeing the coal cars ahead of him, he retraced his steps and

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climbed down to the track on the ladder he used in getting on to the car. He then crossed over to the other side of the track, and looked along the trestle, apparently for the purpose of ascertaining if there was room to pass along the side of the cars. He then turned and started to make his way back to the street. As he started back, an engine, which had backed on to the switch from its opposite end, butted into the standing cars, causing them to move towards and against the appellant, knocking him over and breaking his leg, and causing the injury for which he sues.

There is some dispute in the evidence as to how far the cars moved after being struck by the engine, the witnesses for the appellant varying in their estimates from a foot and a half to ten feet, but the correct distance is probably a little more than the lesser, and much less than the greater, estimate, probably three or four feet. There would seem, however, to be nothing unusual in the fact that the cars moved when struck by the engine, or in the fact that they were so struck; it was simply the usual method of making a coupling where an engine couples on to a train of standing cars.

At the moment the engine struck the cars, the appellant was in a position where he could have been seen from the engine, had a lookout been maintained for him. How long he had been in that position can only be conjectured, but at most it could have been but a short space of time. When he was on top of the box car, he was in view, also, from the end of the switch that the engine entered. Where the engine was then is not shown, but the appellant says he did not see it, and presumably it was out of sight. Be this as it may, however, it is apparent that the appellant was in a position to see the engine at all times when the engineer or fireman could

it comprehensively says, "the actual labor claims incurred in cutting, removing and logging said timber." The words "said timber" must refer to the timber Gillies was to cut and remove under his contract, and cannot be said to refer alone to what should be thereafter cut and removed. The logging company, by its contract with Gillies, was authorized to pay the labor claims, and it was thus protected in such advancements to the extent, at least, of what should be coming to Gillies for logs actually placed in the water. It therefore seems manifest to us that it was not intended by the contract with appellants to place the logging company in a worse position than it was in before, whereby it might become liable for greater sums than those provided by the logging contract. It rather seems to have been intended, merely, to bind the logging company to pay to appellants, to the extent of their claims, any balances remaining in its hands under the logging contract, instead of paying the same to Gillies. It was in effect an order, made by Gillies upon respondent, to pay certain balances, which order was accepted by respondent.

It is assigned that the court erred in admitting evidence as to any indebtedness existing between Gillies and the respondent at the date of the aforesaid contract with appellants, and incurred prior thereto. It is the position of appellants that such evidence was immaterial, for the alleged reason that the contract does not authorize taking into account indebtedness for labor claims theretofore accrued. The purpose of the testimony was to show that respondent had, before the time of said contract, advanced large sums to Gillies, which had been applied upon payment of labor claims in his behalf, and that respondent is entitled to be reimbursed to the extent thereof, for the reason that the contract

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with appellants provides that labor claims shall be first paid. Under the interpretation given to the contract below, and also by this court as hereinbefore stated, it authorizes the payment first of all labor claims from the beginning of Gillies' logging contract with respondent, and including all claims thereafter accruing. The contract states, upon its face, that, under respondent's logging contract with Gillies, it was "authorized to pay the labor claims against said logs." If, then, it made such payments to the laborers directly as their claims accrued, it became in effect an assignee of their claims, and was entitled to be substituted in their places, and receive the payments provided by the contract with appellants. It therefore became material to ascertain the extent of respondent's advancements, and also the amount of logs placed in the water, in order to determine whether respondent was still indebted to Gillies under its logging contract with him, and, if so, what amount still remained in its hands that could be applied to appellants' claims. We therefore think the court did not err in admitting the testimony.

Errors are assigned upon the findings of the court. The court found that the advancements made by the respondent to Gillies were for the payment of labor and certain camp expenses, the larger part being for payment of labor. It was also found that the advances far exceeded the amounts coming to Gillies under his logging contract. The conclusion was, therefore, reached that nothing remains in respondent's hands to be applied upon appellants' claims. The evidence is such as we think sustains the findings, and we shall therefore not disturb them.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, ANDERS, and DUNBAR, JJ., concur.

trians for a considerable time without objection, or with acquiescence on the part of the company, a pedestrian crossing over the same thereby becomes a licensee, and is no longer to be considered as a mere trespasser acting at his peril, and that it is the duty of the company to exercise increased prudence and caution in operating its road at such point, and to keep a reasonably vigilant lookout to prevent injury or accident to those so crossing its grounds [citing cases]. In all these cases the injury occurred at the station or on the depot grounds or yard, where parties would naturally resort and cross over the same, and where the agents and servants of the company could exercise a proper degree of care and watchfulness under the circumstances; but we have not met with any case, in which the point was necessary to the decision, where it has been held that a license can be implied from such acts of frequent use by pedestrians or wayfarers of the main track or bridges or trestles distant from such places as a pathway for travel, though we find that in other states the rule of implied license has been applied to parties frequently crossing the track at particular points other than regular crossings."

See, also, *Schug v. The Chicago etc. R. Co.*, 102 Wis. 515, 78 N. W. 1090; *Spicer v. Chesapeake & O. R. Co.*, 34 W. Va. 514, 12 S. E. 553, 11 L. R. A. 385; *Ward v. Southern Pac. Co.*, 25 Or. 433, 36 Pac. 166, 23 L. R. A. 715; *Brown's Adm'r. v. Louisville etc. R. Co.*, 97 Ky. 228, 30 S. W. 639. But if the rule be otherwise in this state as to the right to acquire a joint right along the track, such right is only acquired by use so definite and long existing as to clearly impute acquiescence on the part of the railroad company in such use. The very slight use made of the trestle in question here by pedestrians, when cars were standing upon it, can not be held to confer such a joint right.

We conclude, therefore, that the appellant, at the time of his injury, was a trespasser, and that the defendants

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could be held liable for such injury only in case their conduct was so grossly negligent as to amount to wantonness. *Matson v. Port Townsend etc. R. Co.*, 9 Wash. 449, 37 Pac. 705. The record in the case before us shows nothing of wantonness or wilfulness on the part of the defendants. It is not in evidence that the servants of respondents observed the presence of the appellant on the track, or that they had any reason to suspect it, and they owed him no duty to look out for him. His injury, for that reason, although lamentable, must be held to be the result of his own negligence rather than because of the default of the respondents.

This view of the relation of the parties renders it unnecessary to discuss the other questions suggested in the argument of the appellant. The "Last clear chance" theory, so ably briefed, can have no application, because there are no facts upon which it can be based. It was not a duty of the respondents to ascertain whether the appellant was behind the car before making the coupling, even though they did know that to do so would move the car a few feet. The appellant was a trespasser, he was where he had no right to be, and it was his duty to protect himself from being injured by movements of the cars, which he must have known were liable to occur at any time. The respondents would have been liable had they actually known of his whereabouts, and had, notwithstanding such knowledge, negligently backed the car upon him, but there is no evidence in the record from which the fact that they did know of his whereabouts, or knew that to move the car would likely injure him, can be inferred; hence there is no room to apply the doctrine contended for.

The judgment is affirmed.

HADLEY, DUNBAR, and MOUNT, JJ., concur.

[No. 5175. Decided December 21, 1904.]

THE STATE OF WASHINGTON, *Respondent*, v. THOMAS
O'HARE, *Appellant*.¹

SEDUCTION — CONDITIONAL PROMISE OF MARRIAGE SUFFICIENT.
Under Bal. Code, § 7066, prescribing the punishment for any person who shall "seduce and debauch any unmarried woman of previous chaste character," seduction under a promise of marriage is not essential to constitute the crime of seduction, any seductive promises being sufficient; and, if an engaged woman finally submits relying upon a conditional promise to marry immediately in case of trouble, there is sufficient evidence to go to the jury.

Appeal from a judgment of the superior court for Adams county, Neal, J., entered February 18, 1904, upon a trial and conviction of the crime of seduction. Affirmed.

Zent, Lovell & Linn, for appellant.

C. L. Holcomb (*O. R. Holcomb*, of counsel), for respondent.

MOUNT, J.—Appellant was convicted of the crime of seduction. A number of errors are assigned, which are without merit, and which do not require discussion. The principal point relied upon is that the evidence was not sufficient to go to the jury. The prosecuting witness testified, in substance, that she first met the appellant in July, 1901; that she was then twenty years of age; that she and appellant began keeping company with each other at that time, and continued to do so until the fall of 1902; that the appellant came to her father's house to see her about twice a week, usually on Wednesday and Saturday evenings; that about the 1st of March, 1902, appellant proposed marriage to the witness, and she ac-

¹Reported in 79 Pac. 39.

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Opinion Per MOUNT, J.

cepted the proposal; that the time for the marriage was set for the spring of 1904; that, soon after the engagement, appellant began making proposals for sexual intercourse; that she refused for a week or two, but finally, on March 18, 1902, after appellant had taken her on his lap and fondled her, and assured her that no harm could come of it, and that if he got her into trouble he would marry her right away, she yielded to his solicitations; that after this time she submitted to his desires quite often, until she discovered that she was in a family way, when, on the 18th day of July, 1902, she told appellant of her condition and requested him to marry her, which he refused to do. On the 15th day of January, 1903, a child was born to the witness. She also testified that she never had sexual intercourse with any one else. On cross-examination she testified in part as follows:

"Q. And you never did give up, did you? A. Yes, sir, I did. Q. So you consented, did you? A. Under promise of marriage I did, yes sir. Q. You consented conditionally then, that he would marry you if he got you into trouble? A. Only so. Q. If he had not promised to marry you right away if he got you into trouble, you would not have consented at the time you did? A. No sir. Q. If he had not promised to marry you right away if he got you into trouble, you would not have submitted; you relied on this conditional promise? A. If he had not promised to marry me I would not have submitted. Q. Answer the question. A. Of course, if he had not promised to marry me right away if he got me into trouble, I would not have submitted to him."

Appellant's contention is that, because the prosecutrix said she submitted to the appellant only upon the promise that he would marry her right away if he got her into trouble, that she would not have submitted but for

that promise, there was no seduction. Several cases are cited sustaining this position, among them *People v. Ryan*, 63 N. Y. App. Div. 429; *State v. Adams*, 25 Or. 172, 35 Pac. 36, 42 Am. St. 790, 22 L. R. A. 840; Am. & Eng. Enc. Law (2d ed.), p. 231. But in the states so holding, especially the ones cited, there can be no criminal seduction under the statutes except under promise of marriage. Our statute contains no such provision. It is as follows:

"If any person seduce and debauch any unmarried woman of previously chaste character, he shall be punished by imprisonment in the penitentiary not more than five years, or by fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding one year. If before judgment upon an indictment the defendant marry the woman thus seduced, it is a bar to any further prosecution for the offense." § 7066, Bal. Code.

This statute does not limit the seduction to those cases only where there is a promise of marriage, as in the cases above cited, but plainly says, "If any person seduce and debauch any unmarried woman of a previously chaste character, he shall be punished." The word "seduce" in this statute is used in its ordinary legal meaning, and implies the use of arts, persuasion, or wiles to overcome the resistance of the female who is not disposed, of her own volition, to step aside from the path of virtue. No doubt the most common method of enticing an unmarried, virtuous woman from rectitude is by promises of marriage, but there are other arts, wiles, and promises which may be made, and which may be acted upon by a virtuous woman. If our statute had intended to limit seduction only to those cases where there was a promise of marriage, it would have said so, as has been done in other states. Not having said so, we must con-

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clude that any seductive arts or promises, where the female involuntarily and reluctantly yields thereto, are sufficient. It is true that, in *State v. Cochran*, 10 Wash. 562, 39 Pac. 155, this court, at page 569, said:

"As to bare promises, although the statute says nothing upon the subject, none other than a promise of marriage should be held sufficient."

This statement, we think, was not necessary to a decision of that case and was therefore dictum. If, however, it was not dictum, we do not desire to follow it, because the statute is plain. It does not confine seduction to a promise of marriage alone, but, on the other hand, clearly intends that any other seductive promise, accomplishing the same result, is equally sufficient. In this case there was an unconditional promise of marriage. The appellant had wooed and won the affections of the prosecutrix. She had promised to become his wife. She relied upon him and believed in him. He then sought her to have sexual intercourse with him. She at first repulsed his advances, but finally, after several attempts, and under promise that he would marry her at once if he got her into trouble, yielded her virtue to him. Even though she submitted to him relying solely upon the conditional promise of marriage and upon no other, we think the evidence makes a plain case of seduction under our statute. *State v. Hughes*, 106 Iowa 125, 76 N. W. 520, 68 Am. St. 288, 44 L. R. A. 397. Under the facts in this case we think there was a clear case to go to the jury. *Cherry v. State*, 112 Ga. 871, 38 S. E. 341; *People v. Wallace*, 109 Cal. 611, 42 Pac. 159.

There is no error in the record, and the judgment is therefore affirmed.

FULLETON, C. J., and HADLEY and DUNBAR, JJ., concur.

[No. 5296. Decided January 3, 1905.]

THE BREHM LUMBER COMPANY, *Appellant*, v. THE SVEA
INSURANCE COMPANY, *Respondent*.¹

INSURANCE—CONDITIONS OF POLICY—CONSTRUCTION—WARRANTY AGAINST IDLENESS OF PLANT FOR MORE THAN THIRTY DAYS—EVIDENCE—SUFFICIENCY. A clause in a policy of fire insurance upon a shingle mill providing that the policy should be void if the property should be idle or shut down for more than thirty days, refers to the stopping of the machinery by which the manufacture is effected; and the policy is vitiated where no shingles are cut and no steam is generated in the boilers for more than thirty days, notwithstanding the fact that shingles are placed in the dry kiln to air dry and are shipped therefrom, or that bolts were brought down ready for manufacture during said period, and such acts do not constitute partial operation of the property.

SAME—INCREASE OF RISK. Where, in answer to questions, an application for insurance upon a steam shingle mill enumerated, as the facilities for extinguishing fires, certain apparatus that could be operated only when fires were under the boilers and steam was up, a clause, conspicuously attached to the policy, providing that the insurance should be void if the property was idle or shut down for more than thirty days, is a reasonable provision to be enforced as any other contract, and, with evidence of idleness, supports a defense that the risk had been increased without the company's consent.

INSURANCE—SEPARATE VALUATION CLAUSES—DIVISIBILITY OF CONTRACT—BREACH OF CONDITIONS AFFECTING ENTIRE RISK. Where, in violation of a clause that the property shall not be shut down, the omission to keep steam in the boilers of a steam shingle mill rendered useless the fire apparatus mentioned in the application, and affected the whole risk, the contract can not be considered divisible by reason of the fact of separate valuation clauses and separate items of insurance upon the mill, the engines and boilers, machinery, dry kiln and pipes, and stock on hand, all in proximity thereto and connected therewith, and if the policy is void as to part it is void as to the whole.

¹Reported in 79 Pac. 34.

Jan. 1905]

Opinion Per HADLEY, J.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered May 7, 1904, upon granting a nonsuit, after a trial before the court and a jury, dismissing an action upon a policy of fire insurance. Affirmed.

F. S. Blattner and Harvey L. Johnson, for appellant.
Reynolds & Griggs, for respondent.

HADLEY, J.—This action was brought to recover for loss by fire in appellant's shingle mill and plant. Respondent, an insurance company, had issued a policy of insurance upon said property in the sum of \$1,500. There are several defenses, but the chief one is that the property had been idle or shut down for a period of more than thirty days prior to the fire, without permission of the respondent, and in violation of the terms of the policy. Another defense is that, after the policy was issued, the hazard was increased without the consent of the respondent, and in violation of the terms of the policy. The cause was tried before the court and a jury, and, when all the testimony had been introduced, the respondent moved the court to discharge the jury and direct that judgment of nonsuit on the merits should be entered in favor of respondent. The jury was discharged upon said motion, and thereafter judgment was entered, dismissing the action at appellant's costs and also, adjudging that the said policy of insurance is null and void, and that appellant shall surrender the same to respondent for cancellation, upon payment by the latter to the former of \$111.33, on account of returned premium. This appeal is from the judgment.

As has already been intimated, the chief controversy here is as to whether the policy was rendered void prior to the fire by reason of the insured property having been

idle or shut down for a period of more than thirty days without respondent's consent. The policy contains the following provision:

"Warranted by the assured . . . that if such property be idle or shut down for more than thirty days at any one time, notice must be given this company and permission to so remain idle for such time must be indorsed hereon or this policy shall immediately cease and determine."

It is neither contended that any notice of a shut down was given respondent, nor that the latter gave its consent thereto. It is admitted that the fire occurred on the 24th day of July, 1903. The evidence conclusively establishes that no shingles were cut at the mill after June 6, 1903, and the manufacturing machinery was entirely idle from that date until the time of the fire. Some fire was kept under the boilers, and steam was forced through the pipes of the dry kiln until June 20, but, from and after the latter date, no steam was generated on the premises for any purpose, the dry kiln pipes not even being heated. It will be observed that more than thirty days elapsed after either date, before the fire occurred, and the question to be determined is whether the property was "idle or shut down," within the meaning of the policy, during a full thirty-day period which had elapsed preceding the fire.

The evidence shows that, during that time, shingles were repeatedly shipped from the mill, and were taken from the dry kiln for that purpose. It is urged that the property was not idle or shut down, for the reason that appellant was engaged in getting bolts down to the mill for manufacture, and was selling and shipping shingles. There is, also, evidence to the effect that some shingles were placed in the dry kiln, but no steam was used to dry

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them, they being left to "air dry." The above comprehends all that was done about the mill and insured property for more than thirty days before the fire. Certainly, the getting of shingle bolts down to the mill, ready to be manufactured, was, in no sense, the operation of the insured property; and, if the property was not idle or shut down, it was because shingles were shipped from the premises, and some were placed in the dry kiln. We think the words used in the policy must be given their ordinary meaning, when considered in relation to the subject matter covered by the policy. The insurance was upon a manufacturing plant, and the words "shut down," as commonly used in relation to such plants, refer to the stopping of the machinery and the mechanism in general by which the manufacture is effected. The word "idle" is likewise used with the same significance. An occasional shipment or handling of shingles, the mere output of the plant, we think cannot be said to include the idea of activity in the movement of the manufacturing appliances, which was evidently intended by the words used in this policy.

In ordinary policies, a similar provision is inserted in regard to notice and consent with reference to the vacation of the property pending the insurance period. But the provision in this policy refers to more than the mere lack of occupancy. The reasons for the provisions are obvious. It is well known that such a risk as this one is extra hazardous, and, with that fact in view, before making this contract of insurance, the respondent asked appellant certain questions in writing. These were answered in writing by appellant, along with its application for insurance. Among other things, appellant was asked as to the existence and number, upon the premises, of

force pumps, hydrants, and other facilities for extinguishing fire—apparatus which could be operated at that place only when fires were under the boilers, and when steam was in readiness to be applied to its operation. The answers disclosed the existence of such facilities upon the premises; and, under the terms of the application, these answers, with others, constituted the warranty on which the contract of insurance was based. It is manifest, therefore, that respondent expected these facilities to be available for use in the event of fire. It knew that they could not be available if the plant were shut down, and it therefore provided that a shut down for more than thirty days without notice to it, and without its consent, should determine its risk, and avoid the policy. The provision is a reasonable one, and, having been plainly and deliberately agreed upon by the parties, it should be enforced, as any other contract provision. This portion of the policy was not included in the ordinary printed matter, but was made a special provision by way of a typewritten slip, attached to the face of the policy in such a conspicuous place that appellant should not have overlooked the fact that it must have notified respondent of the shut down, and obtained its consent, if it expected to keep the policy in force beyond the thirty days. The evidence shows that some other companies carrying concurrent insurance upon this property provided for a sixty-day limit for a shut down, but this company provided for only thirty days, and it was so agreed by the insured when it accepted the policy.

Appellant first assigns that the court erred in denying its motion to strike certain portions of the second affirmative defense, for the alleged reason that respondent offered no evidence in support thereof. That defense is one to which we have already alluded, and is to the effect

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that, after the policy was issued, the hazard was increased without the consent of respondent. We think the evidence to which we have already referred was in support of that defense, and it was, therefore, not error to refuse to strike the allegations.

The principal error assigned is that the court discharged the jury, and rendered judgment as hereinbefore stated. Appellant contends that the contract was an entire one, covering the entire property, and that, to defeat recovery, it must be shown that the entire property was idle or shut down. The policy specifies the mill building, the engines and boilers, fixed and movable machinery, the dry kiln, including piping, fixtures and connections, and also stock of logs, shingles and shingle bolts in process of manufacture, and upon the premises. Five separate amounts are named in the policy for as many separate items, aggregating \$1,500. We do not understand appellant to claim that the policy may be divisible or enforceable as to part, and void as to part, but rather that unless the entire property insured was shut down, the entire policy is enforceable. As to whether the property was shut down, the evidence shows that the only claim of continued operation that is seriously asserted is as to the dry kiln. That item is, however, described in the policy as including piping, fixtures and connections. The pipes were connected with the boilers, and could not be operated for the purposes intended without steam in them, and without fire under the boilers to effect its creation. The dry kiln, as a dry kiln, was, therefore, as completely shut down as was the remainder of the plant. Nothing was done about it but to move shingles into and out of it, chiefly the latter. In *McKenzie v. Scottish U. & N. Ins. Co.*, 112 Cal. 548, 44 Pac. 922, the same question was involved as here. It was claimed that the mill

was not shut down as long as lumber was shipped from the premises. The court observed: "It would be but little more unreasonable to say that a train standing at a station had not stopped because freight was being delivered from the cars." The above remark is peculiarly apt as applied to the claim that the dry kiln in this case was not shut down because shingles were merely moved out of it and into it. The shut down covered the entire property, and we need not, therefore, discuss the authorities cited by appellant on the subject of partial occupancy or operation. Moreover, if this policy be viewed as a divisible one, under its separate valuation clauses, it is nevertheless true that the dry kiln and stock of shingles and bolts upon the premises, for reasons already stated, were in such proximity to the main property and so connected with, and related to, that which was customarily in a state of activity, as made the omission to keep steam in the boilers affect the whole risk covered by the policy as an entirety. In such a case, if the policy is void as to part, it is void as to the whole. It was so held in the recent case of *Republic County Mut. Fire Ins. Co. v. Johnson* (Kan.), 76 Pac. 419. After carefully reviewing the authorities upon the subject of entirety of premium, and divisibility of policies, the court said:

"Therefore, although a policy of insurance so written as to place separate valuations upon separate subjects of insurance will ordinarily be severable, it will not be so unless it can be said that the risk intended to be excluded by a violated condition of the policy did not affect the item of property for the destruction of which a recovery is sought. Although courts are diligent to prevent forfeitures, they may not entirely subvert the contracts of parties deliberately made in an effort to do so."

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The above case and authorities there discussed emphatically support the view that, under the circumstances in the case at bar, the risk is not divisible.

Certain cases are cited in support of appellant's contention that the question of shut down or idleness should have been submitted to the jury. The first is that of *Rockford Ins. Co. v. Storig* (Ill.) 24 N. E. 674. The question in that case was whether the building was vacant or occupied. The statement of the case shows that it had been frequently used, and that, between the fifth and twelfth of January, the day the building was burned, two washings and ironings were done therein. Certainly there was evidence there for the jury.

In *Home Ins. Co. v. Wood*, 47 Kan. 521, 28 Pac. 167, it was also claimed that the dwelling house was vacant, but the opinion shows that "the furniture and household goods were still in the building when the fire occurred, though they were being packed in some of the rooms of the house so as to make vacant other rooms therein; that Wood had slept in the house until within a week or five days of the fire, and then went to Ford's to sleep because he was not well; that he was at the house each day while he slept away, and was there until evening the night of the fire." Such evidence as to occupancy was properly submitted to the jury. The matter of occupancy does not necessarily involve a continuous bodily presence upon premises, and is largely coupled with intent. Under the circumstances detailed in the above case the question was peculiarly for the jury.

In *Des Moines Ice Co. v. Niagara Fire Ins. Co.*, 99 Iowa 193, 68 N. W. 600, the question of vacancy arose. The building was an ice house. At the time of the fire, there was yet a small quantity of ice in the building, but it was not merchantable. All the tools used in putting

up ice were stored in the building, and remained there until it was burned. Thus the matter of occupancy was properly submitted to the jury. The last case cited by appellant upon this point is *White v. Phoenix Ins. Co.*, 83 Me. 279, 22 Atl. 167. It was there held that mere vacancy of property does not avoid a policy in that state, unless it is further shown, as a fact, that the risk is increased, and it was further held that the insurance company should have been permitted to count the presumption of increased risk from vacancy in its favor, or to show facts tending to prove it. The holding that mere vacancy did not avoid the policy, unless the risk was increased, was based upon a statute in Maine as follows: ". . . a change in the property insured, or in its use or occupation, or a breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk," Revised Statutes of Maine, 1883, ch. 49, § 20. That contract with reference to vacancy was made in the state of Maine with that statute in view, and was governed by it.

We are not aware of any statute in this state which prevents stipulations in an insurance contract as to vacancies and shut downs from being enforced as strictly as any other ordinary contract provision.

It will thus be seen that the cases cited by appellant to the point that the question of shut down or idleness, in the case at bar, was for the jury, are all cases involving the matter of vacancy; and it must be conceded that circumstances which may establish the fact of occupancy may be wholly insufficient to establish that a manufacturing plant has been in operation, and has not been shut down. Occasional absence from premises does not necessarily terminate occupancy, but absolute silence of the mechanism and appliances of a manufacturing plant,

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when indisputably shown by evidence, establishes the fact that it is shut down, and leaves no question for the jury. *McKenzie v. Ins. Co.*, *supra*, involved facts almost identical with those in the case at bar, and it was held that the trial court should have found, as a matter of law, that the stipulation in the policy was violated, and should have granted a nonsuit. Facts equally as identical with those at bar were shown in *Cronin v. Fire Assn.*, 123 Mich. 277, 82 N. W. 45, and the court held that the trial court would have been warranted in saying to the jury that the undisputed evidence established the fact.

The court, therefore, did not err in withdrawing this case from the jury, and the judgment is affirmed.

FULLERTON, C. J., and DUNBAR, ANDERS, and MOUNT, JJ., concur.

[No. 5027. Decided January 4, 1905.]

ARMOUR & COMPANY, *Appellant*, v. WESTERN CONSTRUCTION COMPANY *et al.*, *Respondents*.¹

LIENS—RAILROADS—STATUTES—TITLE OF ACT—SUFFICIENCY—PROVISIONS FURNISHED CONTRACTOR NOT EMBRACED IN TITLE OF ACT FOR LABOR AND MATERIAL LIENS. Laws 1893, p. 32, § 1, entitled "An act creating and providing for the enforcement of liens for labor and material," is not sufficiently broad to include a clause rendering a railroad contractor liable for "provisions" furnished to him in the prosecution of the work, since "materials" as used in the lien laws, means something that becomes part of the finished structure; and the clause is not germane to the title and contravenes Const. art. 2, § 19.

INDEMNITY—BOND UNDER VOID ACT—COMMON LAW OBLIGATION—PRIVITY. Where an indemnity bond is given by a railroad contractor, under the provisions of an act void for want of sufficient title, conditioned for the payment for provisions furnished in the prosecution of the work, the surety is not liable to the person furnishing the materials as upon a common law obligation, since there was no privity of contract between them.

¹Reported in 78 Pac. 1106.

36	529
136	694
136	696
36	529
442	294

Appeal from a judgment of the superior court for Clarke county, A. L. Miller, J., entered June 23, 1903, upon sustaining demurrers to the complaint, dismissing an action to recover upon a railroad contractor's bond for supplies furnished. Affirmed.

A. C. & R. W. Emmons and Coover & Stapleton, for appellant. The specific provisions of the act taken collectively are germane and referable to the general object. *People v. Mahaney*, 13 Mich. 481; *Indiana Cent. R. Co., v. Potts*, 7 Ind. 681; *Henry v. Henry*, 13 Ind. 250; *State v. Adamson*, 14 Ind. 296; *Clemmensen v. Peterson*, 35 Ore. 47, 56 Pac. 1015; *State ex rel. McCarty v. Board of Com'rs*, 26 Ind. 522; *State v. Robinson*, 32 Ore. 43, 48 Pac. 357; *Sun Mut. Ins. Co. v. Mayor etc. of New York*, 4 Seld. 241; *Ex parte Howe*, 26 Ore. 181, 37 Pac. 536; *State v. Shaw*, 22 Ore. 287, 29 Pac. 1028; *Miles v. State*, 40 Ala. 39; *Northern Counties Inv. Trust v. Sears*, 30 Ore. 388, 41 Pac. 931; *People ex rel. Rochester v. Briggs*, 50 N. Y. 553; *State ex rel. Bell v. Frazier*, 36 Ore. 178, 59 Pac. 5; *People ex rel. Board etc. v. Banks*, 67 N. Y. 568; *Santo v. State*, 2 Iowa 165; *State ex rel. Weir v. County Judge*, 2 Iowa 280. The provisions are not incongruous, but are consistent, homogeneous, and have one general object. *Morford v. Unger*, 8 Iowa 82; *Whiting v. Mount Pleasant*, 11 Iowa 482; *People ex rel. Badger v. Lowenthal*, 93 Ill. 191; *Blake v. People*, 109 Ill. 504; *Mix v. Illinois Cent. R. Co.*, 116 Ill. 502, 6 N. E. 42; *Johnson v. Harrison*, 47 Minn. 575, 50 N. W. 923, 28 Am. St. 382; *Woodson v. Murdock*, 22 Wall. 353; *San Antonio v. Mehaffy*, 96 U. S. 315; *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391; *Otoe County v. Baldwin*, 111 U. S. 1, 4 Sup. Ct. 265; *Mahomet v. Quackenbush*, 117 U. S. 508, 6 Sup. Ct. 858; *Carter County v. Sinton*, 120 U. S.

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Citations of Counsel.

517, 7 Sup. Ct. 650; *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520; *Maling v. Crummey*, 5 Wash. 222, 31 Pac. 600; *McMaster v. Advance Thresher*, 10 Wash. 147, 38 Pac. 670; *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817; *State ex rel. Dustin v. Rusk*, 15 Wash. 403, 46 Pac. 387; *Bogue v. Seattle*, 19 Wash. 396, 53 Pac. 548; *Karasek v. Peier*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345; *Merritt v. Corey*, 22 Wash. 444, 61 Pac. 171; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737. The effect of the act is to render the railroad company liable. *Barrett v. Millikan*, 156 Ind. 510, 60 N. E. 310, 83 Am. St. 220; *Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354; *Henry etc. Co. v. Evans*, 97 Mo. 47, 10 S. W. 868, 3 L. R. A. 332; *Kansas City etc. R. Co. v. Graham*, 67 Kan. 791, 74 Pac. 232; *Spokane Mfg. etc. Co. v. McChesney*, 1 Wash. 609, 21 Pac. 198. These statutory bonds have been uniformly upheld. *Boisot, Mechanics' Liens*, § 750; *Jordan v. Kavanaugh*, 63 Iowa 152, 18 N. W. 851; *Baker v. Bryan*, 64 Iowa 561, 21 N. W. 83; *Gilmore v. Westerman*, 13 Wash. 390, 43 Pac. 345; *Ihrig v. Scott*, 5 Wash. 584, 32 Pac. 466; *Rounds v. Whatcom County*, 22 Wash. 106, 60 Pac. 139. The bond was a good common law obligation. 1 Dillon, *Munip. Corp.* (4th ed.), § 216; *Sample v. Hale*, 34 Neb. 220, 51 N. W. 837; *Lyman v. Lincoln*, 38 Neb. 794, 57 N. W. 531; *Montville v. Haughton*, 7 Conn. 543; *McDonald v. Davey*, 22 Wash. 366, 60 Pac. 1116. Every action must be prosecuted in the name of the real party in interest. 2 Bal. Code, § 4824; *Seattle Nat. Bank v. Emmons*, 16 Wash. 585, 48 Pac. 262; *Washburn v. Case*, 1 Wash. Ter. 253; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Stinson v. Sachs*, 8 Wash. 391, 36 Pac. 287; *Washington Nat. Bank v. Moyer*, 22 Wash.

622, 61 Pac. 712. The bond was given for the benefit of the plaintiff, who is the real party in interest and may sue in his own name. *Rice v. Savery*, 22 Iowa 470; *Huntington v. Fisher*, 27 Iowa 276; *Baker v. Bryan*, *supra*; *State ex rel. Palmer v. Webster*, 20 Mont. 219, 50 Pac. 558; *Knapp v. Swaney*, 56 Mich. 345, 23 N. W. 162, 56 Am. Rep. 397; *Ihrig v. Scott*, *supra*; *Baum v. Whatcom County*, 19 Wash. 626, 54 Pac. 29; *State ex rel. Bartelt v. Liebes*, 19 Wash. 589, 54 Pac. 26; *Rounds v. Whatcom County*, *supra*; *Seattle v. Turner*, 29 Wash. 515, 69 Pac. 1083; *Eureka Sandstone Co. v. Long*, 11 Wash. 161, 39 Pac. 446; *Sepp v. McCann*, 47 Minn. 364, 50 N. W. 246.¹

1NOTE.—In the parallel case of *Sappington v. same* (post 695) J. M. Long, Alexander Sweek, and James P. Stapleton, for appellant, contended, among other things, that the legal effect of the statute is to require that the railway company either protect itself by a bond or hypothecate its own estate to the extent of the unpaid bills. *Barrett v. Milikan*, 156 Ind. 510, 60 N. E. 310, 83 Am. St. 220; Phillips, Mech. Liens, §§ 65-79; *Laird v. Moonan*, 33 Minn. 358, 20 N. W. 354; *O'Neil v. St. Olaf's School*, 26 Minn. 329, 4 N. W. 47; *Deardorff v. Everhart*, 74 Mo. 37; *Spoffard v. True*, 33 Me. 283; Jones, Liens, §§ 1304-1306; *Jones v. Great Southern*, 86 Fed. 370; *Spokane Mfg. & Lum. Co. v. McChesney*, 1 Wash. 609, 21 Pac. 198. The contractor is made the agent of the owner, and is authorized to bind the owner by purchasing materials and supplies. *Spokane Mfg. & Lum. Co. v. McChesney*, *supra*; *Pils v. Killingsworth*, 20 Ore. 432 26 Pac. 305; Simpson, Am. Stat. Law, par. 1964. The bond company voluntarily entered into the bond, and the principals, after enjoying its benefits, can not raise the question of its invalidity. *United States v. Hodson*, 10 Wall. 395; *Pritchard v. Norton*, 16 Otto 124. Where a party has availed himself of the benefit of an unconstitutional law he can not aver its unconstitutionality, and the principle of estoppel applies. *United States v. Hodson*, *supra*; *Daniels v. Tearney*, 12 Otto 415; *Ferguson v. Landram*, 5 Bush. (Ky.) 230, 96 Am. Dec. 350; *Burlington v. Galtbert*, 31 Iowa 356, 7 Am. Rep. 143; *People v. Murray*, 5 Hill 468; *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624; *Van Hook v. Whitlock*, 26 Wend. 43, 37 Am. Dec. 246; *Stevenson v. Morgan*, (Neb.) 93 N. W. 108.—REP.

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Citations of Counsel.

Cotton, Teal & Minor and *W. C. Bristol*, for respondent Indemnity Co., contended, among other things, that the plaintiff is not in privity, and, as the bond was not made for his benefit as its object, plaintiff has no right of action. *Simson v. Brown*, 68 N. Y. 355; *Crowell v. Currier*, 27 N. J. Eq. 152; *Constable v. National S. S. Co.*, 154 U. S. 51, 14 Sup. Ct. 1062; *National Bank v. Grand Lodge*, 98 U. S. 123; *Montgomery v. Rief*, 15 Utah 495, 50 Pac. 623; *Jefferson v. Asch*, 58 Minn. 446, 55 N. W. 604, 39 Am. St. 618, 25 L. R. A. 257; *Parker v. Jeffery*, 26 Ore. 186, 37 Pac. 712; *Washburn v. Interstate Inv. Co.*, 26 Ore. 436, 36 Pac. 533, 38 Pac. 620; *Weller v. Goble*, 66 Iowa 113, 23 N. W. 290; *Parlin v. Brandenburg*, 2 N. D. 473, 52 N. W. 405; *Durnherr v. Rau*, 135 N. Y. 219, 32 N. E. 49; *Anderson v. Fitzgerald*, 21 Fed. 294; *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; *Shaunessy v. American Surety Co.* (Cal.), 69 Pac. 250; *Austin v. Seligman*, 18 Fed. 519; *State v. St. Louis etc. R. Co.*, 125 Mo. 596, 28 S. W. 1074; *Sayward v. Dexter Horton & Co.*, 72 Fed. 758; *Hennessy v. Bond*, 77 Fed. 403; *Stetson & Post Mill Co. v. McDonald*, 5 Wash. 496, 32 Pac. 108; *Sears v. Williams*, 9 Wash. 428, 37 Pac. 665, 38 Pac. 135, 39 Pac. 280; *Puget Sound Brick etc. Co. v. School District*, 12 Wash. 118, 40 Pac. 608. The plaintiff is not a lien claimant, and the statute seeking to create a contract liability transcends the subject prescribed in its title and embraces more than one subject which is not expressed in its title. *Jacobs v. Knapp*, 50 N. H. 71; *Shaunessy v. American Surety Co.*, *supra*; *San Francisco Lumber Co. v. Bibb*, 139 Cal. 192, 72 Pac. 964; *Steele v. Crider*, 61 Fed. 484; *Jabine v. Oates*,

115 Fed. 861; *Walker v. Whitehead*, 16 Wall 314. This respondent is not precluded from asserting the invalidity of the statute. *Sears v. Williams*, *supra*; *Strong v. Daniel*, 5 Ind. 348. The asserted estoppel is waived by failure to raise the question in the trial court. *Guarantee Loan etc. Co. v. Galliher*, 12 Wash. 507, 41 Pac. 887; *Tuttle v. Merchants' Nat. Bank*, 19 Mont. 11, 47 Pac. 203; *Moran Bros. Co. v. Northern Pac. R. Co.*, 19 Wash. 266, 53 Pac. 49, 1101; *Philipsburg v. Weinstein*, 21 Mont. 146, 53 Pac. 272; *Winsor v. McLachlan*, 12 Wash. 154, 40 Pac. 727; *Oliver v. Dupee*, 16 Wash. 634, 48 Pac. 351.

B. S. Grosscup (W. W. McCredie and A. G. Avery, of counsel), for respondent Railway Company. The subject matter of the act is not embraced within the title. *Percival v. Cowychee etc. Irr. Dis.*, 15 Wash. 480, 46 Pac. 1035; *State ex rel. Henry v. Macdonald*, 25 Wash. 122, 64 Pac. 912; *State ex rel. Seattle Electric Co. v. Superior Court*, 28 Wash. 317, 68 Pac. 957. The act is void as denying to the railroad company the equal protection of the laws. *Santa Clara County v. Southern Pac. R. Co.* 118 U. S. 394, 6 Sup. Ct. 1132; *Pembina Silver Min. etc. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737; *Seattle v. Smyth*, 22 Wash. 327, 60 Pac. 1120, 79 Am. St. 939; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064; *Atchison, Topeka etc. R. Co. v. Campbell*, 61 Kan. 439, 59 Pac. 1051, 78 Am. St. 328, 48 L. R. A. 251; *Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. 149, 53 Am. St. 868; *Gulf etc. R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. 30; *State v. Goodwill*, 33 W. Va. 179, 10 S. E.

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285, 25 Am. St. 863, 6 L. R. A. 621; *Froerer v. People*, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 46 Am. St. 315, 29 L. R. A. 79; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *Atchison, Topeka etc. R. Co. v. Campbell*, *supra*.

DUNBAR, J.—This is an action, commenced in the superior court of the state of Washington for Clarke county, for the purpose of collecting moneys due plaintiff and appellant for certain provisions furnished respondent Western Construction Company, and in which respondent Aetna Indemnity Company is made defendant on account of becoming surety on a bond furnished by said construction company to the Portland, Vancouver & Yakima Railway Company, and in which respondent Portland Vancouver & Yakima Railway Company is made defendant on account of failing to take the bond provided for by statute. The action was for the provisions furnished for the carrying on of said work under the contract with the railway company, consisting of ham, lard, and provisions of like character.

To appellant's complaint respondent railway company demurred, which demurrer was sustained, and an order was made dismissing said action as to respondent railway company, and judgment was entered in favor of said respondent, for its costs and disbursements, against this appellant. The respondent Aetna Indemnity Company, also, demurred to the appellant's complaint, which said demurrer was also sustained, and an order was made dismissing said action as to respondent indemnity company, and judgment was entered in favor of said respondent,

for costs and disbursements, against this appellant. The demurrer of the railway company was upon the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendant. The demurrer of the Aetna Indemnity Company embraced this ground and others. But, with the view that we take of the first ground of demurrer of the railway company, which is the third of the Aetna Indemnity Company, a discussion of the other grounds of demurrer is rendered unnecessary.

The statute which is the basis of this action is § 1, ch. 24, p. 32, of the Laws of 1893, and is as follows:

"Every person performing labor upon or furnishing material to be used in the construction, alteration, or repair of any mining claim, building, wharf, bridge, ditch, dyke, flume, tunnel, fence, machinery, railroad, street railway, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim or stone quarry, has a lien upon the same for the labor performed or materials furnished by each, respectively, whether performed or furnished at the instance of the owner of the property subject to the lien, or his agent; and every contractor, subcontractor, architect, builder or person having charge of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this act: provided, That whenever any railroad company shall contract with any person for the construction of its road, or any part thereof, such railroad company shall take from the person with whom such contract is made a good and sufficient bond, conditioned that such person shall pay all laborers, mechanics and material men, and persons who supply such contractors with provisions, all just dues to such persons or to any person to whom any part of such work is given, incurred in carrying on such work, which bond shall be filed by such rail-

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road company in the office of the county auditor in each county in which any part of such work is situated. And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor."

The title of this act is, "An act creating and providing for the enforcement of liens for labor and material." The contention of the respondent is that the provisions of this act are in contravention of the provision of the constitution § 19, art. 2, that no bill shall embrace more than one subject and that shall be expressed in the title. It will be observed that there is no room for the appellant's claim in this action, unless it is provided for in the proviso to said § 1, and falls within the purview of the following clause, "and persons who supply such contractors with provisions." The first part of the section, down to the proviso, has reference to the claims ordinarily provided for in lien laws for enforcing liens for the furnishing of material or labor, so that the question in this case is whether or not the word "provisions" falls within the reasonable scope or meaning of the word "material," used in the title of the act.

It seems to us that it does not. We may concede the assertion of the appellant, that, in the construction of statutes, courts will not construe the law so as to make it conflict with the constitution, but will rather put such an interpretation upon an act of the legislature as will avoid conflict with, and violation of, the constitution, and give the law force and effect, if this can be done without an extravagant, strained, or fantastic construction, and that in doing so they will construe the act in accordance with the presumed intention of the legislature; and, also, that the law-making body is always presumed to have acted

within the scope of its powers, and to have construed their action from a constitutional point of view. But the constitutional provision was intended as a restriction upon the power of the legislature, and as a protection to the citizen. This court has uniformly decided, also, that the legislature may cover the various provisions of an act by a general title. But the fact still remains that the title must be sufficiently general to embrace all the distinct, separable, and independent provisions of the law, and the provisions of the law must be, in a sense, germane to the title, the object being that a person looking at the title to the law can reasonably determine the subject of that particular law's enactments.

The word "material" has a well defined and understood legal significance. Every state in the Union has laws for enforcing liens for labor and material, furnished in the construction of buildings and other structures; and, when the title of an act is, "An act creating and providing for the enforcing of liens for labor and material," the mind naturally goes to the construction which has uniformly been placed upon the words used in the title of the act, and their ordinary meaning. Under the lien laws, generally, "material" is deemed to be something that goes into, and becomes a part of, the finished structure, such as lumber, nails, glass, hardware, and a thousand other things that might be mentioned, which are necessary to the complete creation of a building or structure; while the word "provisions" is ordinarily understood to be—just what was furnished in this case—some kind of an edible; and it seems to us, in the language of the appellant, that it would be a strained and fantastic view to hold that provisions of this character were comprehended in the word "material." Webster's definition of material is, "The substance or matter of which anything is made or may be made;" and that,

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we think, is the ordinary understanding of the word; while the same author defines provisions as "a stock of food; any kind of eatable, collected or stored." If it should be held that provisions, in this sense, were lienable under the title of this act, because they were a necessary element in the prosecution of the work, by the same reasoning under this title horses necessarily used in the grading of the road, and even the food or provisions used by such horses, could reasonably be contemplated and provided for in the act. It can readily be seen that such a construction would destroy all limitation, and render nugatory this wise provision of the constitution. It was held by this court in *Percival v. Cowychee etc. Dist.*, 15 Wash. 480, 46 Pac. 1035, that the title of an act showing that its object is to provide for the organization and government of irrigation districts, and the sale of bonds arising therefrom, was not broad enough to embrace a provision in the act for validating the indebtedness of a district previously organized, and the levying of a tax to pay the same. In the course of the discussion, the following language was used:

"That the provision in the constitution in question should be reasonably construed and legislation sustained which fairly comes within the subject matter embraced in the title has been frequently held by this court. See *Mars-ton v. Humes*, 3 Wash. 267, 28 Pac. 520; *In re Rafferty*, 1 Wash. 382, 25 Pac. 465. And such we believe to be the tendency of the decisions of all the courts. But it will not do to sustain legislation which is so foreign to the subject matter embraced in the title that one could read such title without having his attention in any manner directed toward the legislation attempted to be embraced thereunder. A title may be as broad as the legislature sees fit to make it, and thereunder any specific legislation, as to any subject relating to the general matter thus broadly embraced in the title, sustained. But when it sees fit to adopt a restricted title and thereunder attempts to enact provi-

sions not fairly within such restricted title, such provisions cannot be given force by reason of the fact that it would have been competent for the legislature to have adopted a more generic title and thereunder properly included all of the provisions of the act."

The same language might, with propriety, be used in this case. The legislature saw fit to adopt a restricted title, such a title as was ordinarily and universally, we think, understood as comprehending substances which went into, and became a part of, a structure; and had the legislature intended to have incorporated into the act an entirely different character of goods, it should have adopted a broader title. And a reference to the act shows that this distinction existed in the mind of the legislature itself, for the proviso makes this distinction when it says that "whenever any railroad company shall contract with any person for the construction of its road or any part thereof, such railroad company shall take from the person with whom such contract is made a good and sufficient bond conditioned that such person shall pay all laborers, mechanics and material men," and then adds "and persons who supply such contractors with provisions." So that, if it had been the legislative understanding that provisions fall within the meaning of materials, the added clause "and persons who supply such contractor with provisions" was entirely unnecessary; because, if the word "material" is broad enough to cover the word "provisions," then those furnishing provisions would have been materialmen.

This case was earnestly presented by many eminent counsel representing the different parties to the action, and exhaustive briefs and able oral arguments were furnished to the court; but the provisions of the statute upon which the appellant relies for judgment in this case are, to our minds, so palpably in conflict with the constitutional pro-

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vision above mentioned that we do not deem it necessary to cite further authority in sustaining the judgment.

It is contended that, so far as the Aetna Indemnity Company is concerned, it is bound in any event on a common law obligation, but this cannot be true for the reason that there is no privity between the appellant and the indemnity company.

We think the court did not err in sustaining the demurrers to the complaint, and the judgment is affirmed.

FULLERTON, C. J., and ANDERS, HADLEY, and MOUNT, JJ., concur.

[No. 5169. Decided January 4, 1905.]

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H. A. HUNTER *et al.*, Respondents, v. WENATCHEE LAND COMPANY, Appellant.¹

PROCESS—ATTACHMENT—SERVICE OF SUMMONS ON FOREIGN CORPORATION OUTSIDE OF STATE. Where an action is commenced by attaching the property of a foreign corporation, personal service of the summons and complaint upon the defendant outside of the state, in lieu of publication, is all that is required under Bal. Code, § 4879.

CONFLICT OF LAWS—ALIENS—RIGHT TO SUE IN THIS STATE—CONTRACTS—LEX LOCI CONTRACTUS. An action between aliens for damages for breach of a contract made in Minnesota whereby the defendants gave the plaintiff the exclusive sale of defendant's lands situated in this state, will not be dismissed as commenced by an alien in a foreign jurisdiction for the purpose of obtaining an undue advantage, where the only advantage alleged is that the contract was not enforceable between the parties in Minnesota under the laws of that state, especially where it appears that the only property of the defendant subject to execution is situated in this state, and the same was the subject of the contract, since the courts of this state will be governed by the laws of the state where the contract was made.

APPEAL AND ERROR—REVIEW—ORDER REFUSING TO DISSOLVE AN ATTACHMENT. Upon an appeal from an order refusing to dis-

¹Reported in 79 Pac.

solve an attachment of the property of a foreign corporation, error in sustaining a demurrer to the defendant's answer can not be reviewed on the theory that the answer showed that the court was without jurisdiction, since the test of jurisdiction was the status of the case upon the issuance of the attachment, which if rightful, is not affected by subsequent proceedings.

Appeal from an order of the superior court for Spokane county, Belt, J., entered January 30, 1904, denying a motion to dissolve an attachment, after a hearing upon affidavits. Affirmed.

Charles A. Murray and *Happy & Hindman*, for appellant, contended, *inter alia*, that the courts of this state should not take jurisdiction of an action to enforce a contract made by aliens in another state. 6 Thompson, Corporations, §§ 8003-8007; *Sawyer v. North American Life Ins. Co.*, 46 Vt. 697; *Smith v. Mutual Life Ins. Co.*, 14 Allen 336; *Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15; Story, Conflict of Laws, § 586; *Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 88. The courts are open to such actions only as a matter of comity, and should not take jurisdiction in such a case as this. *Central R. etc. Co. v. Carr*, 76 Ala. 388, 52 Am. Rep. 339; *Robinson v. Oceanic etc. Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636; *National Telephone etc. Co. v. DuBois*, 165 Mass. 117, 42 N. E. 510, 52 Am. St. 504, 30 L. R. A. 628; *Bank of North America v. Rindge*, 154 Mass. 203, 27 N. E. 1015, 26 Am. St. 240, 13 L. R. A. 56; *Kimball v. St. Louis etc. R. Co.*, 157 Mass. 7, 31 N. E. 697, 34 Am. St. 250; *Morris v. Missouri Pac. R. Co.*, 78 Texas 17, 14 S. W. 228, 22 Am. St. 18, 9 L. R. A. 349; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 59 Am. St. 859, 34 L. R. A. 503; *Burdick v. Freeman*, 46 Hun 138; *Alger v. Alger*, 31 Hun 471; *Gregory v. New York etc. Co.*, 40 N. J. Eq. 38; *Ferguson v. Nielson*, 11 N. Y. Supp.

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524; *Great Western R. Co. v. Miller*, 19 Mich. 305; *Dewitt v. Buchanan*, 54 Barb. 31; *Central etc. R. Co. v. Georgia Constr. etc. Co.*, 32 S. C. 319, 11 S. E. 192; *Goldman v. Furness etc. Co.*, 101 Fed. 467; *Mexican Nat. R. Co. v. Jackson*, 89 Texas 107, 33 S. W. 857, 59 Am. St. 28; *Smith v. Bull*, 17 Wend. 323.

Mark F. Mendenhall and Graves & Graves, for respondents. The action is transitory. Bouvier's Law Dict. Vol. 2 (15th ed.), title, Transitory Action; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 59 Am. St. 859, 34 L. R. A. 503; *Denver etc. R. Co. v. Roller*, 100 Fed. 738, 49 L. R. A. 77; *Smith v. Empire State etc. Co.*, 127 Fed. 462. Nonresidents may avail themselves of attachment proceedings. Drake, Attachments, § 11; *McClerkin v. Sutton*, 29 Ind. 407; *Mitchell v. Shook*, 72 Ill. 492; *Givens v. Merchants' Nat. Bank*, 85 Ill. 442; *Ward v. McKenzie*, 33 Tex. 297, 7 Am. Rep. 261. To deny them this right would contravene the Federal Constitution, art. 4, § 2. *Steed v. Harvey*, 18 Utah 367, 54 Pac. 1011, 72 Am. St. 789; *Eingartner v. Illinois Steel Co.*, *supra*; *Corfield v. Coryell*, 4 Wash. C. C. 371.

DUNBAR, J.—The complaint alleges, in substance, that plaintiffs are residents of Minnesota, and that the defendant is a corporation doing business in Minnesota; that the defendant had a contract to purchase certain lands in the state of Washington, and entered into a contract with the plaintiffs, whereby the plaintiffs were given an agency for the exclusive sale of the lands for a term of three years; that, before said term expired, the defendant sold the timber on said land; that the plaintiffs had expended a large amount of money in ascertaining the value of the land, and of the amount of timber on the same, to wit, the sum of \$10,000, and this case was brought for damages

in the sum of \$87,500; alleging that the contract for the sale of timber was a breach of the contract of agency, and that plaintiffs were entitled to recover that amount.

The action was begun by filing a complaint in the superior court of Chelan county on the 24th day of February, 1903. Also, on said 24th day of February, 1903, a writ of attachment was caused to be issued, which writ of attachment was, on said day, levied upon the property described in the plaintiffs' complaint, which was the only property in the state of Washington in which the defendant had any interest. Attachment was procured, upon the ground that the defendant was a foreign corporation and a nonresident of the state of Washington. No service of process had been had prior to the filing of the complaint. The only service that had been made was by service on the secretary and treasurer of the defendant, at Minneapolis, in Minnesota. Defendant complains that this service was insufficient, and that the court obtained no jurisdiction over the subject matter or the person of the defendant; and defendant, appearing specially for the purpose of the motion, moved to quash and set aside the pretended service of summons; the contention being that § 4877, Bal. Code, provides that service may be made by publication when the defendant is a foreign corporation and has property within the state; that the above is the only provision made for the service upon a foreign corporation outside of the state, and the only provision contained in the statute, unless it can be found in § 4879, which provides that personal service on the defendant out of the state shall be equivalent to service by publication. This proposition, it seems to us, has been squarely passed upon by this court in the case of *Jennings v. Rocky Bar Gold Min. Co.*, 29 Wash. 726, 70 Pac. 136, where the court said:

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"The question here is whether the affidavit for publication of summons required by § 4877, Bal. Code, is a prerequisite to personal service upon the defendant out of the state. The right to subject property within the state to the jurisdiction of its courts is undoubted. If property, real or personal, is appropriately placed within the dominion of the court, then the jurisdiction becomes complete to adjudicate all controversies and all rights in and to such property. The legislature has provided a constructive notice to all persons having an interest in the property. Such constructive notice must be given strictly under the provisions of the statute. But § 4879, Bal. Code, provides for personal service out of the state, and declares it shall be equivalent to service by publication. Thus such personal service out of the state is declared sufficient notice when the court has assumed control of the property within the state. This section itself prescribes that such service is constructive notice, and does not require the affidavit made necessary in service by publication."

The intention of the statute is so plainly expressed, and has been so squarely passed upon by this court, that we do not feel called upon to again enter into a discussion of that proposition, but are satisfied with what was said in that case, which we consider conclusive of the propositions raised in this.

A demurrer was interposed to the complaint, which was overruled. Defendant answered, setting up certain affirmative defenses, among which was that, under the laws of Minnesota, as shown by numerous decisions of the supreme court of that state, the contract set forth in the plaintiffs' complaint was not a contract under which the plaintiffs could recover, for the reason that the law of the state was that, under the provisions of such contract, the owner of the property had a right to sell it himself at any time before it was actually sold by the agent, and that the right to sell was exclusive only as to any one other than

the owner; and that, therefore, the owner having a right to sell, there had been no breach of the contract on the part of the owner, and consequently there could be no damages, either by commission or otherwise. To this affirmative defense, the plaintiffs interposed a demurrer, which was sustained by the court. The plaintiffs then moved to dissolve the attachment. This motion was denied by the court, exception was taken and allowed, and from the ruling of the court in denying the motion to dissolve the attachment, this appeal is taken.

It is insisted by the appellant that, if the complaint does not state a cause of action, the court having no jurisdiction over the subject matter or the person of the appellant, the attachment must necessarily fail, which is no doubt true. The assumption that the complaint does not state a cause of action, and that the court did not have jurisdiction, is based upon the fact that the parties to the action were non-residents of this state, and, therefore, had no right to bring the action in this state, but should be relegated by the courts of this state to the courts of the state where the contract was made, and where the parties reside. Upon this question of the rights of aliens to litigate in the courts of different states, there is a wilderness of authority, and a great diversity of judicial opinion, some courts holding that, in the absence of statutory provision, foreign corporations are suable in domestic tribunals only upon causes of action arising within the jurisdiction; while others hold that it is an absolute constitutional right of the citizen of any state to seek redress in the proper court of any state, regardless of the question of residence; while still others hold that it is altogether a question of comity, and depends entirely upon the attitude of the particular state on that question.

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It may be conceded, we think, that the general rule is that, if it appears that the action is brought by the alien in a foreign jurisdiction for the purpose of obtaining any undue advantage in that jurisdiction, the courts will not lend themselves to the investigation and determination of such a case; and it is contended by the appellant that such is the case shown here; that, by reason of the laws of Minnesota preventing a recovery by the respondents under the state of facts set forth in the complaint, the respondents will obtain an advantage, and be liable to obtain a judgment, which they could not obtain in the domestic tribunal. It is further urged that the witnesses are all in the state of Minnesota, and that it will be burdensome to bring them so great a distance to try this cause. Some affidavits are presented in support of the proposition first discussed.

There seems, to our minds, to be no particular merit in the first proposition urged, for it has been the uniform holding of this court, in harmony with the holdings of all other courts, that the law of the state where the contract was made will be the governing law, in the adjudication of the case in the state where the trial is had. That being the case, no benefit would accrue to the respondents by trying out their case in this jurisdiction, for the presumption cannot be indulged that this tribunal would not recognize and respect the laws of Minnesota. On the question of costs, this case involves a large amount of money, and its determination depends mostly upon the construction of legal documents, rather than upon the testimony of witnesses, and it does not seem to us that any great amount of hardship would be imposed by trying the cause here.

But, in addition to this, the property which is the subject of the controversy is in this jurisdiction, and, while the affidavit of the appellant states that it is amply able to respond to any judgment which may be obtained

against it, there is no showing or statement in said affidavit that the property which could be relied upon to respond to the judgment, if one should be obtained, is in Minnesota. Everything that is set forth in the affidavit might be true and not be in conflict with the affidavit furnished by the respondents that this appellant has no property subject to execution, excepting the property which is the subject of this controversy, and which is located in this state. So that, under all the circumstances of this case, we do not think that we would be justified in denying the aid of the courts to the respondents in the prosecution of their alleged rights.

It is again contended by the appellant that the affirmative defense is a good defense, because it alleges that, under the laws of Minnesota, the contract cannot be enforced; and, because the respondents demurred to that defense, thereby admitting the allegations of the defense to be true, that it is, therefore, conclusive that no cause of action lies in this case, and that, therefore, the attachment must be dissolved. We do not see our way clear to enter into a discussion of whether or not the court erred in its ruling in sustaining the respondents' demurrer to the answer, for the action of the court in that respect has not been appealed from. But the test of the jurisdiction was the status of the case at the time the action was commenced, and if there was sufficient in the complaint, when it was filed, to give the court jurisdiction, the attachment was rightfully issued, and no subsequent proceeding in the court could affect its standing.

The judgment is affirmed.

FULLERTON, C. J., and ANDERS, HADLEY, and MOUNT, JJ., concur.

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[No. 5167. Decided January 5, 1905.]

E. C. BELDING, *Respondent*, v. THE WASHINGTON
CORNICE COMPANY *et al.*, *Appellants*.¹

APPEAL AND ERROR—REVIEW—DEMURRER TO COMPLAINT—APPEAL FROM APPOINTMENT OF RECEIVER. Upon an appeal from an order appointing a temporary receiver, an order made at the time of the appointment, overruling a demurrer to the complaint, can not be urged as error where the complaint is not so defective as to be incapable of amendment, since it is not a final order and is reviewable only on appeal from a final judgment.

RECEIVERS—APPOINTMENT—SUFFICIENCY OF SHOWING. Under the rule of this court to appoint a receiver only where it is necessary to prevent the property from being wasted or lost, it is error to appoint a receiver of a corporation, at the suit of one claiming to hold the majority of the stock, and whom the officers refused to recognize as a stockholder, where the proofs consisted of affidavits showing a dispute as to the rightful ownership of the stock.

Appeal from an order of the superior court for King county, Tallman, J., entered December 26, 1903, appointing a temporary receiver, after a hearing upon affidavits. Reversed.

Morris, Southard & Shipley, for appellants.

Tucker & Hyland, for respondent.

FULLERTON, C. J.—The respondent brought this action against the appellants, alleging that he was the owner, by purchase, of 2,500 shares of the capital stock of the appellant corporation, being five-sixths of the whole of such capital stock, and that the other appellants, who owned the balance of such stock, and who were the officers and managers of the corporation, had refused to transfer his certificates upon the books of the corporation, or recognize in any

¹Reported in 79 Pac. 37.

manner his ownership thereof, and that they had denied him the right to share in the profits of the concern, the right to inspect its books, or to participate in its management or affairs in any manner whatsoever. He sought, by the action, to have his ownership of the shares of stock recognized; to have the same transferred upon the books of the company, so as to show his ownership thereof; to have the appellants Swan Beck and John B. Beck ousted as trustees of the company, and the stockholders permitted to elect new officers to fill the vacancies thereby created; and that he have judgment against such officers for the penalty provided for in § 4270, Bal. Code, and such other and general relief as to the court should seem meet and equitable.

At the time of the filing of the complaint, the respondent also applied for a receiver pending the action. On a hearing, which was had after due notice, the court made an order appointing a temporary receiver, directing him to take possession of the property of the corporation and hold it pending a trial of the action. The appellants excepted to the order, and appealed therefrom, giving a bond superseding the receiver pending the appeal.

The appellants filed a general demurrer to the complaint prior to the time fixed for hearing the application for the appointment of a receiver, which was argued and overruled by the court at that hearing. The ruling on this demurrer constitutes one of the errors assigned, and the appellants urge this ruling for our consideration here. It is at once apparent, however, that an order overruling a demurrer is not of itself an appealable order, and that it is not such in connection with any other order of the court which does not determine the action, or otherwise operate as a final judgment against the party appealing. That a complaint does not state facts sufficient to constitute a cause of action

can, of course, be urged as a ground for reversing an order appointing a temporary receiver; but, to be effective, it must be shown that the complaint not only fails to state a cause of action, but that it is so far incapable of amendment that no action at all can be maintained for the cause stated. That it is merely defective, and subject to demurrer on such ground, is not sufficient; it must appear that the complainant has no cause of action whatsoever, and that the only order that can be entered is a dismissal of the action, before it will have that effect. The complaint here does not present such a case. An action will lie for the causes stated in the complaint, and, if the complaint is defective in any particular, it can only be reviewed on appeal from the final judgment.

On the hearing for the appointment of a receiver, it appeared that the appellant corporation had been organized by the Becks with a capital stock of three thousand dollars, divided into three thousand shares of the par value of one dollar each; that 250 of such shares were issued to John B. Beck, 250 to Swan Beck, and 2,500 to one Carrie Beck, who is the wife of Swan Beck. The respondent claimed to have become the owner, by purchase, for a valuable consideration, of the shares issued to Carrie Beck, and the question of the good faith of that transaction was the main point at issue at the hearing.

It was said by this court in *Ridpath v. Sans Poil, etc., Transp. Co.*, 26 Wash. 427, 67 Pac. 229, that:

"While the power to appoint a receiver to manage the business of a corporation, pending an action between parties over their respective rights therein, exists in courts of general jurisdiction it is a power, nevertheless, which should be exercised with caution, and only under such circumstances as seem to demand exemplary relief. To appoint such a receiver is the exercise of an extraordinary remedy, and is to be resorted to only when the ordinary

remedies are inadequate. The purpose of such an appointment is to prevent the defeat of justice. It is to preserve intact the property and business of the corporation until the conflicting claims of the respective litigants can be heard and determined in the due and ordinary course of procedure followed by the courts. A litigant in such a cause cannot, therefore, prior to the determination of his asserted claims, demand the appointment of a receiver as a matter of right. He must show some necessity for the extraordinary remedy; he must show either that the business of the corporation is being diverted from the purposes for which it was organized to his injury, that its property is in danger of being wasted, destroyed, or removed from the jurisdiction of the court, or that there is no competent person entitled to manage its business or hold its property pending the litigation. To make a *prima facie* showing of right to share in the profits of the concern, and show a denial of such right by the persons in actual control, is not sufficient. For wrongs of this character the ordinary remedies afforded by the courts will furnish ample relief."

Tested by this rule, we think the showing made here insufficient. The proofs on the part of the respondent consisted of the affidavit of Carrie Beck to the effect that the shares of stock were her separate property, and not the community property of herself and husband, and that she had sold them to the respondent for a valuable consideration, and the oral testimony of her attorney that \$450 passed between them at the time the shares were transferred from Mrs. Beck to the respondent. On the other hand, there was testimony tending to show that the stock was the community property of Mrs. Beck and her husband, and uncontradicted evidence to the effect that she had, by a written agreement, agreed to transfer her interest in them to her husband for the consideration of \$1,000, if paid at any time within ten years from the incorporation of the company, and that this sum had actually been

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paid her, although no transfer of the stock had been made. There is some evidence, also, to the effect that the respondent knew of this agreement when he purchased the stock, and took it rather to aid Mrs. Beck than as an actual bona fide transaction.

But it is unnecessary to pursue the inquiry further. On the whole, we think there is no reason to take the business out of the hands of the persons who have built it up and are carrying it on, and put it in the hands of a stranger.

The order appealed from is reversed.

HADLEY, DUNBAR, ANDERS and MOUNT, JJ., concur.

[No. 5359. Decided January 5, 1905.]

JAMES HENRY, *Respondent*, v. AETNA INDEMNITY
COMPANY, *Appellant*.¹

INDEMNITY—BOND GUARANTEEING BUILDING CONTRACT—NOTICE OF ACTS INVOLVING LOSS—WAIVER. Where an indemnity bond guaranteeing a building contract stipulated for notice to the surety of acts which "may involve loss," the failure of the owner to notify the surety that the contractor had failed to meet payments for labor and material will not avoid the bond, where the agents of the surety gave the owner the first notice thereof, and requested payments thereafter to be made through them, and where the general agents had notice of this course, since the notice is thereby waived.

SAME—JUDGMENT AGAINST PRINCIPAL—NOTICE TO THE SURETY TO DEFEND—ESTOPPEL. Where a surety company guaranteed, by the bond, the faithful performance of a building contract in which the contractor agreed to furnish all the material, and is given due notice to defend an action commenced by materialmen to foreclose a lien for material furnished to the contractors, a judgment obtained in good faith against the contractors, the principals in the bond, establishing the claim and foreclosing the lien, is binding upon the surety, to the same extent that it

¹Reported in 79 Pac. 42.

binds the contractors, and, in an action on the bond, estops the surety company from claiming that there was no breach of the contract.

SAME—LIMITATION OF ACTIONS. An action upon an indemnity bond guaranteeing a building contract, which required suit to be brought within six months of the first breach of the contract, is commenced in time if within six months of the time the building was to be completed, and within six months of the plaintiff's knowledge of any breach of the contract.

Appeal from a judgment of the superior court for King county, Griffin, J., entered December 18, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon an indemnity bond. Affirmed.

Root, Palmer & Brown, for appellant.

James B. Murphy, for respondent.

HADLEY, J.—This is an action upon a contractor's indemnity bond. The complaint shows that the contract price for the construction was \$5,940, and avers that the contractor violated the terms of the contract by failing to pay the claims for labor and material which entered into the construction, and thereby allowing such claims to be assessed against the property to the extent of \$3,314.06 in excess of the contract price. It is also averred that, immediately after such default became known to the property owner, he duly notified the surety company thereof, and demanded that it pay, or cause to be paid, the asserted demands, and should save him harmless therefrom. Demands, as asserted in various filed lien notices, are set out, and it is alleged that suits were brought to foreclose the same; that immediately thereafter the property owner notified the surety company in writing thereof, tendered it the defenses to said actions, and demanded that it should defend the same, and save the owner harmless from the ex-

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pense of such defenses; that the surety failed and refused to interpose any defenses, or to assume any expense in connection therewith; that the owner was compelled to employ counsel and interpose defenses to said actions, and that he did all that could properly be done to protect the premises against said claims; that said actions were tried and resulted in judgments establishing the liens, together with attorney's fees and costs, aggregating the sum of \$3,746.04; that the owner was thereupon compelled to pay, and did pay and satisfy, said judgment liens, and that he also incurred an additional expense of \$200 as attorney's fees in the defense of said actions. It is further alleged that, before the last payment under the building contract was made, the surety company, through its duly authorized agents, requested that payments under the contract should be made to said agents, and that, for some time prior to the completion of the building, said agents received the money due the contractor, and disbursed it in satisfaction of claims against the building as the surety company directed, all with the consent of the contractor. The answer denies, generally, the material averments of the complaint, and affirmatively alleges that this action was not brought within six months of the contractor's default, as required by the terms of the bond. The cause was tried by the court without a jury, and resulted in a judgment against the surety in the sum of \$4,165.07, and for costs. The surety company has appealed.

Several assignments of error relate to the same general subject and will be discussed together. The local representatives of appellant in Seattle were Calhoun, Denny & Ewing, while its general agents were Clemens & O'Brien, located in Portland, Oregon. It is urged that the court erred in admitting evidence tending to show that the local representatives waived conditions in the bond, and in hold-

ing that their acts were binding upon appellant. The bond provides that the surety company shall be notified, in writing, of any act on the part of the contractor which may involve loss for which the surety is responsible; that such notice shall be given by registered letter, directed to said Clemens & O'Brien, immediately after the occurrence of such act shall have come to the knowledge of the respondent. It is contended that knowledge of the contractor's failure to meet the payments due for labor and material came to respondent, and that he did not immediately notify appellant as provided in the bond. We think the evidence satisfactorily shows that respondent was not advised of the contractor's probable default until he was notified by Calhoun, Denny & Ewing, appellant's own agents in Seattle, that they desired that the payments under the contract should thereafter be made to them instead of to the contractor; even then it was stated to respondent by these agents of appellant that they did not think any difficulty would arise about the payments, but, as a matter of precaution, they desired respondent to make his payments to them so they could disburse the money. The contractor joined in the request for respondent to so make his payments, and this course was pursued from some time early in August until about the first of the following October, when the said agents notified respondent that they refused to receive and disburse any further payments. The contract in terms called for the completion of the work August 15, but it was not so completed, and the work was continued and the payments made in the manner aforesaid after that time.

It is contended by appellant that no authority is shown from it to Calhoun, Denny & Ewing, the agents in Seattle, to receive and disburse the money as was done. It is not disputed, however, that Clemens & O'Bryan, the general agents in Portland, had the power to authorize such a

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course, and we are satisfied from the evidence that they were advised from time to time, by the Seattle agents, as to what was being done, and that they acquiesced therein. Thus the probable default of the contractor was brought home to appellant, so that it had actual knowledge thereof, and not only that, but it approved and adopted what it deemed to be a good course in view of such knowledge. Even if respondent had actually known of the contractor's probable default, it was not necessary that the formal notice specified in the bond should be given when appellant already knew the fact, and was acting upon its knowledge for its own protection. Moreover, as we have said, we do not think it appears that respondent had any intimation of the probable default in payments until he received it from appellant's agents, and he was even then misled by their remark that they thought no difficulty would arise. As we understand the record, the said Seattle agents were the only representatives of appellant in the state of Washington, and, under the circumstances we have detailed, together with the evidence before us concerning the knowledge of the general agents as to what was being done, and as to their directions in the premises, we think the Seattle agents acted by authority of appellant. The court, therefore, did not err in admitting the criticized evidence, and in holding thereunder that the acts of the Seattle agents were by authority of appellant, and amounted to a waiver of the necessity for the formal notice of failure to pay claims against the property. That the acts of appellant's agents in the premises amounted to a waiver is sustained by the following authorities: 13 Am. & Eng. Enc. Law (2d ed.), p. 345; *Cushing v. Williamsburg City Fire Ins. Co.*, 4 Wash. 538, 30 Pac. 736; *Home Ins. etc. Co. v. Myer*, 93 Ill. 271; *Harris v. Phoenix Ins. Co.*, 85 Ia. 238, 52 N. W. 128; *German Fire Ins. Co. v. Stewart*, 13 Ind. App. 627, 42 N. E. 286; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34

Am. Rep. 323. In the last cited case the court, when speaking of the subject of waiver, said:

"Nor is it necessary to prove an express agreement to waive. On the contrary it may be inferred from the acts and conduct of the insurer inconsistent with an intention to insist upon a strict performance of the condition."

See, also, *Orvington v. Aetna Indemnity Co.*, ante p. 473, 78 Pac. 1021.

What is said above applies also to the necessity for formal notice of failure to complete the building at the contract time. The evidence shows that, when that time arrived, the work was still in progress, and both the contractor and appellant, through its said agents, were working in harmony in the endeavor to hasten the completion and close the contract without loss. To that end they were then both directing the respondent as to how he should make his payments under the contract, and this course was continued for some time thereafter, as we have seen. Respondent might have complained of the failure to complete the building on time, but he waived the default, and the conduct of appellant, in its subsequent supervision and receipt and disbursement of accruing payments under the contract, shows that it, also, waived the default, and impliedly, at least, consented to an extension of the time. Moreover this record discloses no attempt to show that appellant was damaged by the contractor's failure to complete the building on time. Often such an extension may result in actual benefit to the assured, and since no damage is shown to have resulted from it in this instance, it is not ground for release of a compensated surety, within the decision in *Cowles v. United States, etc.*, 32 Wash. 120, 72 Pac. 1032.

What has been said applies to the futility of a formal notice of probable default in payment of labor and mate-

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rial claims, when appellant was already advised of the fact and was acting thereon, even if it be conceded that respondent was in possession of the same knowledge. The court, however, found as a fact that respondent gave appellant full written notice in the premises, in all respects as required by the bond, immediately after the occurrence of the acts of the contractor which might involve loss to the appellant became known to respondent or his agent. We think the finding was justified by the evidence and we shall not disturb it. It is true, as a matter of common experience it might be supposed that respondent's suspicions would at least have been aroused when the appellant itself, through its agents, requested him to make contract payments to them, and not to the contractor direct. But it will be remembered that he was, at the same time, told that no trouble was apprehended by appellant, and that the course was adopted as a mere matter of precaution. The evidence does not disclose additional direct knowledge on the part of respondent until he was notified by appellant's agents that they refused to receive and disburse further payments. The written notice was given immediately thereafter, in compliance with the strict terms of the bond. Thus the court seems to have decided the case upon the theory that the necessary notice was actually given, and not upon the theory that the notice was waived, but inasmuch as the record contains much evidence bearing upon the subject of waiver, and since appellant argues the case as if the matter of waiver entered into the court's decision, we have hereinbefore discussed that subject.

The appellant also assigns as error that the court refused the introduction of evidence as to the value of the claims which were satisfied by respondent, and also refused to permit appellant to show that certain of the claims reduced to judgment were neither binding nor valid against respond-

ent's property. This point was decided against appellant's contention in *Friend v. Ralston*, 35 Wash. 432, 77 Pac. 794. It was there held that, when the surety has had due notice of the pendency of the lien suits, and has been tendered the defense thereof, it is estopped from asserting that the judgments are not correct in the absence of a showing that they were obtained by fraud or collusion and not in good faith. No such showing is made here. The evidence shows that appellant was duly notified of the pendency of the lien suits, and was tendered the defense thereof, but that it declined to participate therein.

Appellant does not directly assign that the court erred in holding that this suit was brought within six months of the first breach of the contract as provided in the bond, but that subject was made an issue by the pleadings, and is probably involved in the assignment that the court erred in refusing a nonsuit. The action was brought within six months of the time the work was to be completed, and was, therefore, within the contract time, as far as that breach of the contract was concerned. Under the court's finding as to knowledge on the part of respondent of the breach by failure to pay labor and material claims, the action was also brought far within six months of the time respondent came into possession of such knowledge.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, ANDERS, and DUNBAR, JJ., concur.

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Statement of Case.

[No. 5060. Decided January 5, 1905.]

FRANK R. MCKINLEY *et al.*, Respondents, v. DAN
MORGAN, Appellant.¹

EXEMPTIONS—FINDINGS OF BANKRUPTCY COURT—CONSTRUCTION—AWARD OF EXEMPTIONS—CONCLUSIVENESS—EXECUTION SALE OF EXEMPT PROPERTY—QUIETING TITLE. In an action to quiet title to lands sold to defendant under execution, and claimed by plaintiffs to have been set aside to them as exempt in a bankruptcy proceeding, the finding of the referee in bankruptcy that "the schedules of the bankrupt disclose no assets except such as are claimed exempt and found by the court to be exempt," warrants the trial court in finding that the property was pronounced exempt by the referee and shows sufficient title in the plaintiff; since the schedules must include all the property, and such adjudication of the bankruptcy court being conclusive, the sale of the property in the state courts under execution was void.

QUIETING TITLE—POSSESSION OF PLAINTIFF—COMPLAINT—SUFFICIENCY. An allegation in a complaint in an action to quiet title that the plaintiffs are entitled to the immediate possession of the property, does not make it appear that the plaintiffs are out of possession, and that ejectment is, therefore, the proper remedy.

QUIETING TITLE—POSSESSION OF PLAINTIFF—NECESSITY OF—ESTOPPEL—FAILURE TO DEMAND JURY OR OBJECT TO FORM OF ACTION. An action to quiet title will not be dismissed by the supreme court on the ground that ejectment was the proper remedy, because of the plaintiffs' failure to allege or prove that they were in possession or that the land was unoccupied, where the defendant answered on the merits and proceeded to trial without demanding a jury, or raising the objection in the court below.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered September 22, 1903, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, quieting the title to real estate. Affirmed.

¹Reported in 79 Pac. 45.

Thomas Neill, for appellant.

H. E. Foster and John Pattison, for respondents.

DUNBAR, J.—This is an action to quiet title, brought by the respondents against the appellant, to certain lots of land in the town of Oakesdale in Whitman county, Washington. The complaint makes the ordinary allegations in cases of this kind. The defendant answered, in substance, that he had obtained title to the land in dispute by purchase at execution sale, on judgment rendered against the respondents in favor of J. Ogle, trustee, said judgment having been assigned in writing to the appellant. The reply alleged the discharge in bankruptcy of the appellant by the United States bankruptcy court, at Seattle, Washington, and alleged that the property in dispute had been set aside as exempt property by the referee in bankruptcy in said bankrupt proceedings. Upon the issues made by the pleadings and the stipulated facts, judgment was entered in favor of the plaintiffs as prayed for.

The substantial finding made by the court, so far as the matter in controversy is concerned, is that the said bankruptcy court duly and regularly set aside, to the said Frank B. McKinley, one of the plaintiffs herein, all of the property in controversy in this action, as exempt to him, and that the said order and judgment of the said district court of the United States, for the Western District of Washington, was conclusive in said matter. The contention of the appellant is that this finding was not justified by the facts, and that the conclusion that the bankruptcy court had set aside, as exempt, this property to Frank R. McKinley was a conclusion of law that was not based upon the facts in the case.

The court found, and there is no controversy on that subject, that the petition in bankruptcy was duly filed,

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that the lots in controversy were listed and claimed as exempt under the said bankruptcy act. The following finding was made by the referee in bankruptcy:

"It appearing that the schedules of the bankrupt disclose no assets except such as are claimed exempt and found by the court to be exempt, that no creditor has appeared at the first meeting, that the appointment of a trustee for the bankrupt's estate is not now desirable, it is ordered that until the further order of the court no trustee will be appointed and no further meeting of the creditors be called."

It appears from the complaint, and is not disputed, that more than a year has elapsed since this order was made, but it is contended that this order of the referee in bankruptcy does not justify the conclusion that the property had been found to be exempt by the court.

This branch of the case falls squarely within the rule announced by this court in *Smalley v. Laugenour*, 30 Wash. 307, 70 Pac. 786, where it was held that, a bankrupt being obligated to schedule all his property in his petition for bankruptcy—that claimed as exempt as well as that not so claimed—the bankruptcy court has jurisdiction to pass upon the character of all his property, and set apart the exemptions allowed by law; that, the supreme court being empowered by the bankruptcy act to prescribe all necessary rules for carrying it into effect, and having provided by rule that no trustee need be appointed in certain cases, the failure to appoint a trustee under such circumstances would not affect the jurisdiction of the bankruptcy court to make a valid order with reference to the bankrupt's exempt property. It was also held in that case that a judgment in a bankruptcy court relates back to the institution of the bankruptcy proceedings, and, where it had adjudged certain property exempt from debts as a home-

stead, a sale in the state courts of such property under execution was void, although the execution sale was prior to the award of exemption in bankruptcy, but subsequent to the initiation of the proceedings. This proposition, however, we do not understand to be disputed by the appellants, but we think the statement of the court that "it appears that the schedule of the bankrupt discloses no assets except such as are claimed exempt and found by the court to be exempt," warranted the trial court in the finding that the property had been pronounced exempt by the referee in bankruptcy, and that the language is not susceptible of any other construction.

The remaining assignment of error is that the court could not enter the kind of judgment that was entered in this case, for the reason that the amended complaint alleges that respondents are entitled to the immediate possession of said premises, and every part thereof; and it is argued that, if they were entitled to immediate possession, then they did not have possession, and that, consequently, this was properly an action in ejectment, and not an action to quiet title. We do not think that it necessarily follows, from the statement that they are entitled to immediate possession of said premises, that they do not have possession, for their right to possession would be one of the questions in issue in this case under the pleadings, and it might become important for them to show that they had the right to possession.

But it is contended, under the doctrine announced in *Spithill v. Jones*, 3 Wash. 290, 28 Pac. 531—which was to the effect that an action to quiet title would not lie where the plaintiff was out of possession—that an action to quiet title should be dismissed for want of equity where there was no proof showing that plaintiff was in posses-

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sion of the land in question or that the same was unoccupied by any person. This is a case with which this court has never been entirely satisfied, and we do not care to extend the doctrine there announced. But, even if it did not appear from either the pleadings or the proof in this case that the land was in the possession of the plaintiff, or that it was unoccupied by any person, we think the appellant is estopped from raising this question here, under the rule announced in *Bates v. Drake*, 28 Wash. 447, 68 Pac. 961. There it was said, in speaking of *Spithill v. Jones*, that,

"It is clear, however, from the the opinion as a whole, that the court did not mean by its use of this term that it was without jurisdiction or power to determine the subject-matter of the controversy between the parties or that a judgment entered therein would have been void, but meant rather that equity would not entertain a suit to quiet title when the plaintiff had an adequate remedy at law, and that he had such adequate remedy in that case by an action of ejectment against the person in possession. In other words, it was held that the plaintiff had mistaken his form of action, and the court would not permit him to maintain it over the objection of the defendant. And this must be so from the nature of the objection. The fact that the plaintiff is or is not in possession, or that the land is or is not vacant, does not affect the jurisdiction of the court to determine the subject-matter of the controversy between the parties, nor does it affect the merits of that controversy, but affects only the plaintiff's right to have the merits of the controversy determined in that particular form of action. Being so, it is a right which the defendant can waive, and when he does so, and consents to a trial upon the merits, the judgment entered therein is not void, or voidable even, except for errors committed in the course of the trial which would render the judgment voidable were the plaintiff's right to maintain the action absolute."

In this case this question was not raised, but the defendant answered on the merits of the case, and allowed the issues to be tried out and judgment rendered without objection. Counsel says, in answer to this proposition, that the complaint was one that was not demurrable because it stated a cause of action. But according to his contention it did not state a cause of action in equity, no jury was demanded, no objection raised to the equitable cognizance of the court, and it is now too late to raise such objections here. The judgment is affirmed.

FULLERTON, C. J., and ANDERS, HADLEY, and MOUNT, JJ., concur.

[No. 5415. Decided January 7, 1905.]

THE STATE OF WASHINGTON, *on the relation of the City of West Seattle, Plaintiff*, v. THE SUPERIOR COURT
FOR KING COUNTY, *et al.*, Defendants.¹

PROHIBITION—WHEN LIES—JURISDICTION OF COURTS TO ENJOIN CANVASS OF ELECTION RETURNS—ADEQUACY OF REMEDY BY APPEAL. Prohibition does not lie to prevent the superior court from taking jurisdiction of an action brought by a property owner to enjoin the officers of a city from canvassing the returns of a special election, held therein for the purpose of annexing plaintiffs' property, on the ground of non-compliance with the election laws, fraud, and the unconstitutionality of the act under which the election was held, since the court had jurisdiction of the action to determine such questions, and there is an adequate remedy by appeal.

SAME—EMERGENCY—DELAY IN COLLECTION OF TAXES. Upon an application for a writ of prohibition sought by a city to prevent the superior court from taking jurisdiction of an action to enjoin the canvass of the returns of a special election held for the purpose of annexing territory, sufficient emergency to warrant the

¹Reported in 79 Pac. 29.

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issuance of the writ is not shown by an affidavit to the effect that the collection of taxes will be delayed, since time alone does not affect the adequacy of an appeal.

SAME—REMOTE DAMAGES. In such a case, neither is an emergency shown by the fact that contemplated street railway construction by the city would probably be done upon better terms now than later, since that is too vague and speculative.

Application to the supreme court, filed October 18, 1904, for a writ of prohibition, to prevent the superior court for King county, Bell, J., from taking jurisdiction of an action to enjoin the officers of the relator from canvassing the returns of a special election to annex territory. Writ denied.

Herbert N. De Wolfe, for relator.

Hughes, McMicken, Dovell & Ramsey and *Ira Bronson*, for defendants.

DUNBAR, J.—This is an original application for a peremptory writ of prohibition. The application shows that the relator is a party defendant in an action brought in the superior court for King county, by the Puget Mill Company, a corporation, against this relator and its officers to restrain the city from canvassing the returns of a special election held in said defendant city and in territory sought to be annexed to said defendant city. The complaint was filed and a restraining order issued on the 1st day of October, 1904. The returns, as required by law, were to have been canvassed on Monday, October 3, 1904. The defendants appeared specially and moved the court for an order requiring the plaintiff to make its complaint more definite and certain, and to strike other parts as frivolous and immaterial, which motion was denied by the court. Defendants then interposed demurrers to the jurisdiction of the court, the same being overruled by the court. The relator

seeks in this petition to prohibit the court from taking jurisdiction of and trying the above-mentioned case. The complaint in the injunction proceedings is exceedingly lengthy, and alleges, among other things, that the defendants were guilty of fraud and conspiracy in undertaking to extend the city limits over plaintiff's lands; that no authority existed for such action in a city of the fourth class; and that the action of the city in progressing from a city of the fourth class to a city of the third class was illegal and fraudulent.

As to the right of the relator to a prohibition in this case, it has been held, over and over again, by this court, that prohibition will not lie whether the trial court is acting with or without jurisdiction, if there is an adequate remedy by appeal. It is contended by the relator, in the first place, that the court has no jurisdiction of the subject-matter in this action, the question being entirely a political question of which the courts cannot take or have cognizance; that, in the second place, there is no adequate remedy at law. We think this petition must be denied on both grounds. If the court below has jurisdiction to try the cause, this court cannot arrogate to itself the original jurisdiction, which is conferred by the constitution upon the superior court, but can only exercise the constitutional function of an appellate tribunal; and, without passing upon the question of whether or not the subject of extension of city limits is a political question in such a sense that the determination of that question is not vested in the courts, there are certain questions which are raised by the complaint in this case, and which stand unchallenged in this proceeding, which are, without doubt, questions within the jurisdiction of the trial court. It is contended by the complaint that the lands which are sought to be incorpo-

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rated within the city limits are such lands as, by reason of their location, could not legally be incorporated in such city; that the city did not comply, or attempt to comply, with the law in relation to notices; and, further, that the act under which the city was proceeding is unconstitutional and void. While in certain classes of cases the discretion in the determination of certain questions is vested in the municipality, in all cases the proceedings must be carried on under the provisions of the law, or property rights would be arbitrarily destroyed without any possible redress, and certainly an action of any kind must be maintained under laws which are not repugnant to the fundamental law—the constitution of the state—and we see no reason why the constitutionality of the act in question cannot be determined in this case.

Again, the affidavit of emergency in this case made by the mayor of the city is not sufficient, we think, to warrant the issuing of the extraordinary writ, and of taking the case out of its regular course on appeal. So far as the taxes are concerned, if the territory is ever annexed, the taxes from that time on can be collected; and it could scarcely be contended that the argument that, if the case is advanced, the territory sought to be embraced will the sooner commence paying taxes to the municipality, is an effective one for the purpose of taking the case out of its regular course. The other matters set forth in the affidavit, namely, that the city is desirous of extending a railroad to the beach for the purpose of getting the benefit of the excursion travel next summer, and that better terms could probably be made now, so far as contracting for the construction of the road is concerned, than could be afterwards obtained, is entirely too vague and speculative to rest any legal right upon. This court has decided

that, in considering the adequacy of an appeal, time alone will not be considered, nor the expenses incident to a prolonged litigation, provided the fruits of the appeal are not lost by the delay. In such cases the appeal will not be considered adequate, but all litigation is fraught with vexatious delay and incidental expenses, and if this alone were sufficient to justify extraordinary writs of this character the effective method of appeal would soon grow into disuse.

The application for the writ is denied.

FULLEERTON, C. J., and MOUNT, HADLEY, and ANDERS, JJ., concur.

[No. 5222. Decided January 16, 1905.]

WILEY H. YOUNG, by his *Guardian ad Litem*, MARION G. YOUNG, *Respondent*, v. TERANCE O'BRIEN, *Appellant*.¹

MASTER AND SERVANT—NEGLIGENCE—FALL OF ELEVATOR—NEGLIGENCE OF FELLOW SERVANT—EVIDENCE—SUFFICIENCY. In an action for injuries sustained by an elevator boy through the starting of the elevator by the janitor after the completion of repairs, there is no evidence of negligence by the janitor requiring the submission of instructions relating to fellow servants, where the janitor testifies that, after the repairs were completed, he untied the lever, which suddenly flew over before he could stop it, and the only other evidence tending to show neglect of the janitor being that the accident might have been caused by suddenly throwing over the lever instead of starting it slowly.

SAME—SCOPE OF EMPLOYMENT—INSTRUCTIONS. It is not error to refuse an instruction to the effect that if the plaintiff, an elevator boy, injured in the fall of an elevator, was outside of the scope of his employment at the time of the accident, he could not recover, where it appears that he entered the elevator to take charge of it after the completion of repairs, according to his usual custom, and where the court instructed that, in order to find for the plaintiff, the jury must find that he was in the elevator in the course of his employment.

¹Reported in 79 Pac. 211.

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Citations of Counsel.

SAME—FALL OF ELEVATOR—INSPECTION—FAILURE OF SAFETY CLUTCHES TO OPERATE—CAUSE OF ACCIDENT—INSTRUCTIONS. In an action for injuries caused by the fall of an elevator, it is not error to refuse to instruct that the fact that safety clutches did not work was not proof of negligence unless it appeared that an inspection would have disclosed their failure to operate, where there was no express request for such instruction, and the jury were properly instructed as to the duty of inspection, and that they could not infer that the machinery was defective from the mere fact of an accident, but must find a defect which was the proximate cause of the injury.

SAME—ASSUMPTION OF RISKS—INSTRUCTIONS. Instructions upon the assumption of risks by a servant are not objectionable as being limited to risks known to him at the time of entering the employment, when they plainly state that the servant assumes the risks of dangers known to him.

APPEAL AND ERROR—TRIAL—INSTRUCTIONS—HARMLESS ERROR. It is not error to refuse requested instructions that are covered by instructions already given.

APPEAL AND ERROR—EVIDENCE—FAILURE TO OBJECT. Error cannot be predicated upon the admission of testimony received without objection or motion to strike.

DAMAGES—VERDICT WHEN NOT EXCESSIVE. A verdict for \$1,350 for injuries sustained in the fall of an elevator will not be disturbed as excessive where the plaintiff was severely injured in his foot, which injury might be troublesome for a long time, and the weakness in his foot decreased his earning ability as a carpenter, since it does not appear to be the result of passion or prejudice.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 19, 1904, upon the verdict of a jury for \$1,350 damages for personal injuries sustained by an employe through the fall of an elevator. Affirmed.

Piles, Donworth & Howe and *John P. Hartman*, for appellant, contended, among other things, that the plaintiff cannot recover, because outside the scope of his employment in going into the elevator without authority. Sher-

man & Red., Negligence, 207; Labatt, Master and Servant, 337; *Goff v. Chippewa etc. R. Co.*, 86 Wis. 237, 56 N. W. 465; *Olson v. Minneapolis etc. R. Co.*, 76 Minn. 149, 78 N. W. 975, 48 L. R. A. 796; *Boyd v. Blumenthal*, 3 Penn. (Del.) 564, 52 Atl. 330. The instructions as to the safety clutches should have been given. *Kaye v. Rob Roy etc. Co.*, 4 N. Y. Supp. 571; *Hart v. Naumburg*, 123 N. Y. 641, 25 N. E. 385; *Stackpole v. Wray*, 77 N. Y. Supp. 633; *Spees v. Boggs*, 198 Pa. 112, 47 Atl. 875, 82 Am. St. 792, 52 L. R. A. 933. Instruction No. 14 should have been given. *Patton v. Texas etc. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275; *Hansen v. Seattle Lum. Co.*, 31 Wash. 604, 72 Pac. 457.

Tucker & Hyland and *J. W. McBurney*, for respondent.

HADLEY, J.—This action was brought to recover damages for personal injuries alleged to have been received by respondent, the elevator boy who operated the passenger elevator for the Sullivan building, in the city of Seattle. The injuries were received through the falling of the elevator. The appellant had the exclusive charge and management of the building, including the elevator. Respondent charges that appellant negligently permitted the elevator to be and remain in a defective and unsafe condition, which fact was unknown to respondent, and that, by reason of such negligence, he was injured. The appellant pleads assumption of the risk and contributory negligence on the part of respondent. The cause was tried before the court and a jury. A verdict was returned in favor of respondent, appellant moved for a new trial, which was denied, and judgment was rendered for the amount of the verdict. This appeal is from the judgment.

It is assigned that the court erred in failing to instruct the jury, as requested by appellant, in regard to negligence

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of the fellow servant. This contention is based upon the claim that there was sufficient evidence of negligence on the part of the janitor of the building to warrant the submission to the jury of the question of negligence of a fellow servant. The evidence shows that, on the day of the accident, the elevator had been closed for repairs. No attempt to operate it had been made during that day until about the time of the accident. When the party who, in behalf of appellant, superintended the repairs had finished his work, he called for respondent to take charge of the elevator. This was about two o'clock p. m., and respondent had been waiting about the building to return to his duties as soon as the repairs were completed. At the moment the work was completed, he was not present at the elevator, but was in the building. Not seeing him when he was called, the janitor, who was, also, accustomed to handling the elevator, was requested to start it. He prepared to do so, and a moment later respondent returned, and was admitted to the cage by the janitor. The latter moved the lever, and the elevator became at once seemingly unmanageable. The testimony is to the effect that the operating mechanism did not respond to the movements of the lever, and that the cage ascended and descended almost with the rapidity of a shot from a gun. This occurred two or three times, when it struck with great force at the top of the building, and then fell to the bottom of the elevator tunnel. There was testimony to the effect that, if the lever had been suddenly thrown over without allowing the air to pass out slowly, the result might have been the same as what occurred at the time of this accident. It is, therefore, argued that the proper method was to move the lever slowly to one side until the air had passed out. The conclusion drawn from the argument is that, since the elevator per-

formed as it did, its action must have been due to a too sudden movement of the lever by the janitor, who, it is claimed, was respondent's fellow servant. The argument is, however, a mere speculative one so far as the testimony in the case is concerned. There was no testimony to the effect that the lever was moved suddenly or far over. The respondent testified as follows:

"Q. How was the elevator door? A. It was not quite shut; it was a little ajar; and I came around the corner and just after he noticed me, I walked up to the door and he opened it, and I went inside and he started to throw the lever over, and we went up to the second floor, as near as I can remember."

The janitor himself testified as follows:

"Q. Mr. Marten, in what manner did you use this lever when you started this elevator going this day? A. In the first place, the lever was tied down with a piece of rope, to keep it from working up; and as I untied the lever the lever flew over before I had hardly a chance to get hold of the lever—it flew over, and I grabbed it as quick as possible, and she began dancing up and down, as I told you before. Q. To what extent did you push it one way or the other? A. Just a little ways over; I always did because I had run elevators so many times, and I never threw it right over."

The foregoing was the evidence on the subject, and it was insufficient to raise the question of neglect on the part of the janitor in the movement of the lever.

There was, also, testimony to the further effect that, when the elevator struck the beams at the top of the building, the ropes might have been thrown off so that the governor and safety clutches would not work. Such testimony was in the nature of a mere opinion or argument that the accident might have so happened. Granting, for the moment, that it did so happen, the value of the testimony

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must be based upon the theory that the janitor had been previously neglectful in the manner of handling the lever. There was, however, no testimony that the ropes were thrown off. The two men who cleared away the wreck, and started the elevator after the accident, testified at the trial. If the ropes had been thrown off, it may reasonably be supposed that they would have discovered it, but they did not so testify. There was, therefore, no tangible evidence of neglect on the part of the fellow servant to be submitted to the jury. An instruction upon that subject would have left the jury to speculate thereon without evidence. Although a requested instruction may contain a correct statement of the law, it is not error to refuse it, when there is no evidence before the jury on the particular subject. *Woo Dan v. Seattle Electric R. etc. Co.*, 5 Wash. 466, 32 Pac. 103; *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1122; *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674.

It is also urged as error that the court refused to instruct the jury, as requested, that, if the respondent at the time of the accident was outside the scope of his employment and if his position in the elevator was at the time unauthorized by appellant, he could not recover. We think there was no evidence upon which to base such an instruction. As already stated, the respondent was in waiting to take charge of the operation of the elevator the moment the repairs were completed. The evidence further shows conclusively that he had done this upon many occasions before when the elevator was out of repair, and that appellant expected him to be in readiness to resume his duties as soon as the machine was ready for operation. On this particular occasion, appellant's representative in charge of the repairs called for respondent as soon as he was

ready to turn over the elevator for operation. Inasmuch as he was not at that instant present, the janitor was requested to take charge of it and start it. The mere fact that respondent did not appear in the elevator until a few moments later, and the further fact that he was not, at the moment of his appearing, requested to enter the cage, we think cannot be said to raise any question as to his removal at that time from the scope of his employment. He was at his proper place, ready to assume the duties expected of him, and to which he had been called a moment before. In any event, however, the court did instruct the jury that, in order to find for the plaintiff, they must first find "that he was in the elevator at the time in the course of his employment." If there had been any evidence sufficient to raise this question, the above instruction submitted it to the jury. It was not error to refuse the requested instruction.

Error is further assigned upon the court's refusal to instruct, as it is alleged was requested, that, if the safety clutches did not work at the time of the accident, such fact was not proof of negligence unless it appeared that an inspection would have disclosed the reason of their failure to operate. No specific instruction is designated in the brief under this assignment, by number or otherwise, and we find no one among the requested instructions in the record which in express terms refers to the idea of lack of liability, in the event an inspection by appellant would not have revealed any defect in the clutching devices. While the court did say to the jury that the duty is upon the employer to inspect machinery provided for the employee in the conduct of his employment, yet it was further said that such duty was "to inspect in a reasonable way," and "to exercise reasonable care to ascertain whether or not the machinery used is in a rea-

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sonably safe condition." Thus the rule given the jury as to inspection called for only reasonable care, and they could not have failed to understand that, if they found such reasonable care was exercised, and if certain defects could not thereby have been discovered, then there was no negligence as to such defects. We think, therefore, it should not be said, as argued, that the instructions left the jury to infer negligence from the mere fact that an accident happened. In this connection the following instruction was given:

"In order to find for the plaintiff, therefore, in this case, gentlemen, you must be able to ascertain from the evidence that the defendants, or one of them, were negligent as charged in the complaint, and you must be able to find from the evidence that there was some defect in this machinery as charged in the complaint, which was the proximate cause of the injuries the plaintiff sustained, if he sustained such injuries. If you should find that there were certain defects in this machinery, that alone would not be sufficient, unless you should find from the evidence that the injuries sustained by the plaintiff, if he did sustain any injuries, were sustained by reason of the existence of that particular defect. Some defective machinery might have been there that would not have been responsible for the accident that occurred, but you must be able to fix as the cause of this accident that it resulted from some defect in that machinery."

Thus it was made clear to the jury that they could not infer that the machinery was defective from the mere fact that the accident occurred, but that they must find from the evidence that there was some defect, and that it was the proximate cause of respondent's injuries.

It is next urged that the court erred in its instructions on the subject of assumption of risk. It is alleged that the instructions were to the effect that the servant assumes the risk of such dangers only as are known to him

at the time he enters the employment of the master. We fail to find any instruction which seems to be susceptible of the limited interpretation urged. The court plainly told the jury, in effect, that an employee assumes the risk of such defects as are known to him, and the significance of which he appreciates; that, by reason of the defect of which he has knowledge, he must, as a reasonable man, know that a danger will result to him. We think the instructions given upon this subject were not erroneous.

It is next complained that the court should have given appellant's requested instruction number 14, which was to the effect that the evidence as to negligence must be definite, and, if the testimony is uncertain in this respect, or shows that any one of different things might have brought about the injury, it is not the province of the jury to guess between the different causes, but they must find negligence from some specific individual showing. We think this ground was fully covered by the instruction hereinbefore quoted, and it was not error to refuse a further instruction embracing the same subject.

It is alleged that the court erred in allowing a witness for respondent to testify, over objection, concerning the custom in regard to testing elevators at the time they are installed. The court did not permit the witness to testify as to the custom, but expressly declined to do so. He was permitted as an expert to testify as to what is necessary to be done in the installation of elevators. The witness did testify that the safety appliances of this particular elevator were never tested at the factory, and were not tested when the machine was installed, but there was no objection to the question which called for such answer, and no motion was made to strike the testimony. The matter is, therefore, not reviewable here.

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It is last urged that the court erred in allowing the verdict to stand, for the alleged reason that the amount, \$1,350, is excessive. While it may not appear conclusively that permanent injuries were incurred, yet there was testimony to the effect that respondent was severely injured in his foot, and that the anatomy thereof is such that the injury may be troublesome for a long time. It was also shown that his vocation is now that of a carpenter, and that weakness in the foot may materially decrease his earning ability. Considering the evidence and the amount of the verdict, we think it does not appear that passion or prejudice prompted the amount. Under such circumstances we shall not disturb it. *Rush v. Spokane Falls & Northern R. Co.*, 23 Wash. 501, 63 Pac. 500.

We find no prejudicial error and the judgment is affirmed.

MOUNT, C. J., and FULLERTON and DUNBAR, JJ., concur.

[No. 5110. Decided January 16, 1905.]

THE STATE OF WASHINGTON, *on the Relation of Tom Brown, Appellant, v. JOHN McQUADE et al., as Directors etc., Respondents.*¹

MANDAMUS—WHEN LIES—SCHOOLS—COMPELLING SCHOOL BOARD TO ISSUE WARRANT FOR TEACHER'S SALARY. Mandamus will lie upon the application of a school teacher to compel a board of school directors to issue a warrant for his salary, if anything is due under a contract providing that he was to be paid by a warrant drawn by the school board on the county treasurer, the remedy at law being inadequate, since it could only result in a judgment directing the issuing of a warrant.

SAME—MANDAMUS UNDER THE CODE. The principle that the writ of mandamus issues only where the right thereto is clear

¹Reported in 79 Pac. 207.

36	579
40	456
40	475
36	579
142	378

has no application to the writ authorized by the Code, and hence may issue, although sought to enforce disputed claims, the procedure under the code having all the elements of a civil action.

SCHOOLS AND SCHOOL DISTRICTS—CONTRACT TO TEACH SCHOOL—VALIDITY. It is error to dismiss a proceeding in mandamus to enforce a teacher's contract to teach school, on the theory that it was illegal to contract to teach a district school forming a part of a union district, and at the same time to teach in a union high school in the same building, as there is nothing illegal in such contract.

MANDAMUS—PLEADINGS—REPLY. It is not necessary, under the code, to reply to a return or answer to mandamus, new matter being deemed denied.

Appeal from a judgment of the superior court for King county, Rudkin, J., entered October 26, 1903, upon motion of the defendants, dismissing an application for a writ of mandamus, after hearing the plaintiff's evidence. Reversed.

Horace A. Wilson, for appellant.

Fred H. Peterson, for respondents.

FULLERTON, J.—This is a proceeding in mandamus, instituted by the appellant to compel the respondents, who are officers of school district number 68, to issue to him a warrant for \$100, which he claims to be due him as part of his salary for teaching in the public school of district number 68, during the school year of 1902 and 1903. In his application for the writ, the appellant alleged that on the 12th day of July, 1902, the directors of the school district named entered into a contract with him, by the terms of which he agreed to teach in the public schools of that district for a period of ten months, at a salary of \$100 per month, payable at the end of each month out of the funds of the school district, upon a warrant drawn by the directors payable by the county treasurer. He then alleges that he entered upon the per-

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formance of his contract at the time agreed upon, and fully and faithfully performed the same on his part; that the respondents paid the salary agreed upon for each month of the school year, except the month of June 1903, for which month the directors, unlawfully and without reason, excuse, or justification, adopted a resolution withholding the warrant for his salary, and ever since have refused to issue such warrant, although demand had been made upon them therefor.

On the filing of this application, the court issued an alternative writ of mandate, to which the directors made return, and subsequently an amended return, the latter only appearing in the record sent to this court. In this return it is admitted that a contract was entered into between school district number 68 and the appellant, by which the appellant was employed to teach in the public school of that district, but deny that such a contract was made as the appellant sets out. On the contrary, they allege that the appellant was employed to teach in both school district number 68 and the union high school composed of districts numbered 68, 4, and 20, and that he was to receive the sum of \$80 per month for his services to district 68, and \$20 for his services in the high school, all of which was to be paid by district 68. Further, it was alleged that the respondent did not faithfully comply with his contract, in that he did not issue and deliver to graduating pupils a diploma, as the rules and regulations governing the conduct of the schools required; also, that he had taken and appropriated to his own use certain property of the district of the value of \$14, which he had not accounted for; and that, subsequent to the institution of the proceedings, he had received from the union high school \$200, which, together with the amount paid him by district 68, made \$100 more than he was

entitled to for his services under the contract. The prayer was that a peremptory writ be denied, and that the respondents be permitted to go hence without day.

After the filing of the amended return, a trial of the issues was entered upon, at which the appellant offered himself and one W. E. Holland as witnesses, their evidence tending to support the right of the appellant to the relief demanded by him. The court, however, after the appellant had testified, and in the course of the examination of Mr. Holland, on motion of the respondents, dismissed the proceedings on the ground that it was not a case in which mandamus would lie, remarking, while giving the reasons for his conclusion, that, if the rule were otherwise, he did not think the evidence offered made a case entitling the appellant to a writ.

On both questions, we think the learned trial judge was in error. By virtue of the statute the writ of mandamus may issue to any inferior tribunal, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; and, clearly, it was the duty of this school board to draw a warrant for the appellant's salary as a teacher, if any such salary was due him. As his contract with the district provided that he was to be paid by a warrant drawn by the school board on the county treasurer, in no other way was he entitled to receive payment for his services, and, unless he can force the board to act, it is difficult to see how he is going to get paid at all. An action at law against the district will not furnish him relief. The most he could obtain by such an action would be a judgment against the district which would entitle him to a warrant drawn by the directors on the county treasurer. He could not obtain a judgment which could be collected by execution. If the judgment was not paid

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voluntarily—if the directors still refused to act of their own volition—he would yet have to resort to mandamus to secure his rights.

It would seem, therefore, that in reason the claimant could resort to the remedy of mandamus in the first instance. But it is said that the remedy of mandamus is only applied where the right to the thing sought is clear, that it is not a procedure to determine disputed claims, and that here the directors disputed the right of the appellant to the amount claimed by him to be due as salary. But however effective this contention might have been, when applied to the writ as anciently administered, it has no application to a writ denominated mandamus by the Code. Formerly mandamus was regarded as a prerogative writ, issued not as of right, but at the pleasure of the sovereign, or state, in his or its name, as an attribute of sovereignty, but with us the writ is not in any sense a prerogative writ, or a writ to be issued at the discretion of the court. It is a procedure under the Code, and any person who has a cause that calls for its invocation has the same right to sue out the writ as he has to commence a civil action to redress a private wrong. As we said in *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50, a proceeding in mandamus,

“ . . . is a judicial investigation, the object of which is the determination of civil rights, the same as in any ordinary proceeding; not only the determination of rights, but their determination in such a way as to culminate in an effective judgment.”

In our practice, mandamus is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs. The procedure has in it all the elements of a civil action. The facts stated in the affidavit for the writ may be controverted by a return,

raising both questions of law and fact. The return likewise may be controverted, and a trial had on the issues of fact thus raised, either before the court, a jury, or a referee, as the court may order. Judgment can be entered on the verdict or findings not only directing the issuance of a peremptory mandate, but for damages and costs on which execution may issue. The statute has been so framed as to afford complete relief in all cases falling within its scope and purport, whether these be cases of wilful violations of recognized rights, or denials, made in good faith, that the rights contended for exist. In other words, the right to sue out the writ is not made to depend on the character of the dispute, but on what answer is given to the question, can the ordinary course of law afford a plain, speedy, and adequate remedy? If the ordinary course of law will furnish such a remedy, the writ will not issue; otherwise, it will. It was to avoid circuity of action, thus doing away with the necessity of resorting to more than one proceeding for the enforcement of a right, that the law was framed.

This court has many times recognized the differences between the modern and the ancient writ, and has repeatedly upheld the remedy in cases where formerly it would have been denied. The case of *State ex rel. Race v. Cranney*, above cited, is an illustrative case. There it was held a proper proceeding to test the question whether a redemption from a tax sale had been properly allowed by the county treasurer—a proceeding involving questions of both law and fact. In *Cloud v. Town of Sumas*, 9 Wash. 399, 37 Pac. 305, it was held that mandamus was the only proceeding in which the question of the legality of a city warrant could be tried. To the same effect is *Abernethy v. Medical Lake*, 9 Wash. 112, 37 Pac. 306. In *State ex rel. Achey v. Creech*, 18 Wash.

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186, 51 Pac. 363, it was held the proper remedy to compel a sheriff, who had levied upon community property, to set aside that part which is exempt from execution; and in *Achey v. Creech*, 21 Wash. 319, 58 Pac. 208, it was held that the mandamus proceeding, inasmuch as damages for a wrongful levy could have been recovered therein, operated as a bar to a subsequent action for such damages.

In *Bacon v. Tacoma*, 19 Wash. 674, 54 Pac. 609, it was held that mandamus was the only remedy that would lie to compel the payment of a city warrant, even though the liability of the city thereon was disputed on the ground that the warrants were forgeries, since the statute governing the proceeding in mandamus permitted the trial of disputed questions of fact. In that case, after reviewing other cases, it was said:

"And so it may be said here, that if the plaintiff should maintain this action and recover judgment against the city, all he would get in satisfaction of his judgment would be other warrants, such as he now has. And it is therefore apparent that not only this, but any other action of like character, would be entirely futile."

That case is specially in point in the case at bar on the question of the adequacy of the relief; there, as here, a judgment such as could be obtained in a civil action at law afforded only a partial relief. And in *State ex rel. Dudley v. Daggett*, 28 Wash. 1, 68 Pac. 340, it was held that mandamus was the proper remedy to compel the certification of a pay roll for the salary of a public officer, notwithstanding the right to the office was involved, and certification had been refused because the right of the claimant to the office was in dispute. Other cases from this court, bear-

ing more or less strongly upon the question, are the following: *State ex rel. King v. Trimbell*, 12 Wash. 440, 41 Pac. 183; *State ex rel. Starrett v. James*, 14 Wash. 82, 44 Pac. 116; *State ex rel. Sheehan v. Headlee*, 17 Wash. 637, 50 Pac. 493; *State ex rel. Weinberg v. Pacific etc. Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208; *State ex rel. Ross v. Headlee*, 22 Wash. 126, 66 Pac. 126; *State ex rel. Cann v. Moore*, 23 Wash. 115, 62 Pac. 441; *Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259, 67 Pac. 710; *State ex rel. Hill v. Gardner*, 32 Wash. 550, 73 Pac. 690; *State ex rel. Evers v. Byrne*, 32 Wash. 264, 73 Pac. 394; *State ex rel. Bussell v. Callvert*, 33 Wash. 380, 74 Pac. 573. These cases, as we say, may be more or less of a departure from the writ as early administered, but they fall clearly within the statutory proceeding, and furnish abundant justification for its exercise in the case at bar.

On the question of the sufficiency of the evidence, we think the appellant's testimony made a *prima facie* case, on which he should have been awarded relief, if it was not overcome by evidence to a contrary effect. From the language of the trial judge, it would seem that he thought the appellant's contract illegal, but we find nothing upon which to base such a conclusion. The testimony was to the effect that the graded school of district 68, and the union high school composed of districts 4, 20 and 68, were held in the same building; that the appellant was employed to superintend both schools, a part of his duty being to teach in both; that for his services he was to receive \$100 per month from district 68 and \$20 per month from the union high school. Surely there was nothing in this on which to conclude that the contract was illegal.

There was no reply filed controverting the facts set out in the return. The respondents now claim that their re-

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turn must be taken as true, and that, inasmuch as they plead facts which, if true, would defeat a recovery, that the judgment was right in any event, and must be affirmed. To this there are several answers, only one of which, however, is necessary to be noticed. No reply is provided for or contemplated in the procedure. On the contrary, it is expressly provided that the applicant is not precluded by the answer from any valid objection to its sufficiency, nor from countervailing it by proofs on the trial, either by direct denial or by way of avoidance. That no reply was contemplated will appear less strange when it is remembered that our act is a literal transcription of the California law on the same subject, and in that state replies are not a part of the pleadings, even in civil actions, new matter and counterclaims in the answer being deemed denied, as new matter and counterclaims set out in replies are deemed denied in this state.

The judgment appealed from is reversed, and the cause remanded for further proceedings.

MOUNT, C. J., and HADLEY and DUNBAR, JJ., concur.

[No. 5018. Decided January 17, 1905.]

SETH L. CHAMBERLAIN, *Appellant*, v. ROBERT ABRAMS *et al.*, *Respondents*.¹

FRAUDS, STATUTE OF—ORAL AGREEMENT TO. CONVEY LANDS—DAMAGES FOR BREACH OF CONTRACT—TRIAL—NONSUIT ON OPENING STATEMENT. An action for damages for breach of a contract to convey lands, seeking to recover the value of the lands, which had been fully paid for and quitclaimed to the plaintiff by the defendants before they acquired any title, and which the defendants afterward sold to a bona fide purchaser, cannot be maintained and a nonsuit is properly ordered, where it appears from the opening statement of counsel that the agreement to convey was oral, since it is within the statute of frauds.

¹Reported in 79 Pac. 204.

SAME—QUITCLAIM DEED AS MEMORANDUM OF SALE. A quitclaim deed is not a sufficient memorandum to take an oral sale of lands out of the operation of the statute of frauds, when the grantors had no title at the time of the conveyance.

SAME—PAYMENT AS PART PERFORMANCE. Payment of the purchase price is not a sufficient part performance of an oral agreement to convey lands to take the same out of the operation of the statute of frauds.

Appeal from a judgment of the superior court for King county, Bell, J., entered June 30, 1903, upon granting a nonsuit upon plaintiff's opening statement to the jury, dismissing an action on contract. Affirmed.

William C. Keith and Tucker & Hyland, for appellant, contended, among other things, that, where a verbal contract to convey is made, and a conveyance is made accordingly, the statute of frauds is no defense to an action to recover the price. *Brackett v. Evans*, 1 Cush. 79; *Preble v. Baldwin*, 6 Cush. 549; *Linscott v. McIntire*, 15 Me. 201, 33 Am. Dec. 602; *Thayer v. Vils*, 23 Vt. 494; *Morgan v. Bitzenberger*, 3 Gill 350; *Thomas v. Dickinson*, 14 Barb. 90; *Gillespie v. Battle*, 15 Ala. 276; *Gillett v. Knowles*, 108 Mich. 602, 66 N. W. 497; *Michael v. Foil*, 100 N. C. 178, 6 S. E. 264, 6 Am. St. 577.

Hughes, McMicken, Dovell & Ramsey, for respondents.

FULLERTON, J.—In this action the appellant sought to recover \$4,000, and interest, for a breach of a contract to convey real property. In his complaint the appellant alleged that on September 4, 1894, the respondents conveyed to him, for the consideration of two thousand dollars, which he then and there paid them, an undivided one-fortieth interest in certain described lands situated

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in the county of King. Paragraph 4 of the complaint was as follows:

"That at the last mentioned date the title to the premises above described stood in the name of the state of Washington, and that the same were, and still are, tide lands of the state of Washington, and were at the time of making the said conveyance by defendants to plaintiff, and as a part of the consideration thereof the defendants, and each of them, promised, covenanted and agreed to and with the plaintiff that they, the said defendants and each of them, would well and truly proceed in the capacity of prior improvers and upland owners on the said premises to procure a full and valid title in fee simple from the state of Washington, to the said lands; and further promised, covenanted and agreed, as a part of the conveyance aforesaid, that they, and each of them, would hold in trust, for the use and benefit of said plaintiff, all the lands and premises conveyed, and intended to be conveyed, by the said deed dated September 4th, 1894, up to and including the time that the title to the same in fee simple should have been perfected in plaintiff, according to the aforesaid agreement. That subsequently thereto, and within less than three years prior to the commencement of this action, the said defendants, and each of them, wrongfully, and with the intent to defraud and cheat the plaintiff, conveyed by a good and sufficient conveyance to one S. S. Bailey, all the right, title and interest conveyed to said plaintiff by said defendants by deed dated September 4th, 1894."

It was then alleged that the consideration paid by Bailey to the respondents exceeded the sum of \$2,000; that the land was, at the time of such conveyance, and is now, of the value of \$4,000; that the appellant, when he learned of the conveyance to Bailey, demanded of respondent an accounting, which was refused him; that Bailey is an innocent purchaser for value of the property; and that, by reason thereof, the lands are wholly and irrecov-

erably lost to appellant. Facts tending to take the case out of the statute of limitations are then alleged, followed by a demand for judgment in the sum above mentioned.

Issue was joined on the allegations of the complaint by appropriate denials, and the cause called for trial before the court and a jury. At the trial, in opening his case to the jury, the appellant stated that the conveyance mentioned in the complaint was a quitclaim deed, and that the agreement referred to in paragraph 4 of the complaint above quoted was an oral agreement. At the conclusion of the statement, the respondent challenged the sufficiency of the appellant's cause of action, on the ground that the agreement set out in the complaint was within the statute of frauds, contending that it was such a contract as must be in writing in order to be enforceable. This contention was sustained by the trial court, and the action dismissed, at the appellant's costs.

In this state it is provided by statute that: "All conveyances of real estate, or any interest therein, and all contracts creating or evidencing any incumbrance upon real estate, shall be by deed;" and that, "A deed shall be in writing, signed by the party bound thereby, and acknowledged by the party making it, before some person authorized by the laws of this state to take acknowledgment of deeds." Bal. Code, §§ 4517, 4518. The appellant concedes that, under these statutes, an oral agreement to convey land or an interest therein cannot be enforced, but suggests a number of considerations which are thought to avoid the statute. He first suggests that his action is not to enforce an oral agreement for the conveyance of land, but is rather in the nature of an action to recover the purchase price of land conveyed pursuant to an oral agreement, where the vendee seeks to defeat payment because

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of the invalidity of the agreement. Many cases are cited in which this question was involved where recovery was allowed, but it seems to us that the principle governing their decision is widely different from that governing the case at bar. In the cases cited, the conveyance was made pursuant to the oral contract, and the land itself, or the benefit derived therefrom, was received by the vendee, and the actions were brought to recover the agreed consideration, while here the complaint is, and the whole action is founded upon the fact, that the conveyance agreed upon was never made. In the one, the contract was so far performed as to take it out of the statute of frauds, while in the other, the contract is wholly executory.

Nor does the fact that the appellant is seeking to recover damages for a breach of the contract, rather than to enforce a specific performance, alter the case. Before there can be a recovery in damages for the breach of a contract, there must be an enforceable contract. Damages flow from the violation of legal rights, not for the violation of mere moral obligations, however strong they may appeal to the conscience. Unless the appellant had the legal right at some time to specifically enforce the contract set out in his complaint his present action will not lie.

Nor can it be held that the contract sued upon was so far in writing as to avoid the statute. The instrument of conveyance described in the complaint, which is the only writing pertaining to the contract, was shown by the opening statement to be a quitclaim deed. In this state such an instrument is in no sense an agreement on the part of the grantor therein that he will convey to the grantee any title he may thereafter acquire to the property conveyed, nor does it in any way obligate him to make such a con-

veyance, and, of course, unless it does one or the other, it can not be said to be a contract in writing in which one person agrees to convey to another lands or an interest in lands. Nor does the deed itself pass an after-acquired title. Such a deed is a "good and sufficient conveyance . . . to the grantee . . . in fee of all the then existing legal or equitable rights of the grantor in the premises therein described, but shall not extend to the after-acquired title unless words are added expressing such intention." Bal. Code, § 4521. On no theory or principle, it seems to us, can this deed be said to be a sufficient writing to remove the agreement set out in the complaint from the operation of the statute.

The most favorable view to the appellant that can be drawn from the pleadings, is, that he stands in the position of one who has paid the purchase price of lands upon an oral agreement to convey. But this does not aid him. Payment of the purchase price, either in whole or in part, is not a sufficient part performance of an oral agreement to convey lands to take the agreement out from the operation of the statute of frauds. 2 Story's Equity Jur., § 760; Pomeroy's Contracts (2nd ed.), § 112; Waterman, Specific Perf. of Contracts, § 268; Fry, Specific Perf. of Contracts, § 588; *Forrester v. Flores*, 64 Cal. 24, 28 Pac. 107; *Fulton v. Jansen*, 99 Cal. 587, 34 Pac. 331; *Thompson v. New South Coal Co.*, 135 Ala. 630, 34 South. 31, 93 Am. St. 49; *Parker v. Wells*, 6 Wharton 152; *Gangwer v. Fry*, 17 Pa. St. 491, 55 Am. Dec. 578; *Townsend v. Fenton*, 30 Minn. 528, 16 N. W. 421; *Baker v. Wisewell*, 17 Neb. 52, 22 N. W. 111. See, also, from this state: *Johnson v. Puget Mill Co.*, 28 Wash. 515, 68 Pac. 867; *Sherlock v. Van Asselt*, 34 Wash. 141, 75 Pac. 639; *Graves v. Smith*, 7 Wash. 14, 34 Pac. 213.

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Citations of Counsel.

Whether an action would lie to recover the purchase money so paid is a question not presented by this record, and need not here be considered.

The judgment is affirmed.

MOUNT, C. J., and DUNBAR and HADLEY, JJ., concur.

[No. 5391. Decided January 17, 1905.]

A. D. CAMPBELL, *Trustee in Bankruptcy of the North Pacific Glass & Bottle Company, Respondent*,
v. WILLIAM MCPHEE, *Appellant*.¹

CORPORATIONS—STOCKHOLDERS—STOCK NOT FULLY PAID IN—ASSESSMENT ON STOCK—DEFENSE OF BONA FIDE PURCHASE. In a proceeding in bankruptcy to assess the stockholders of an insolvent corporation upon stock not fully paid up, a stockholder cannot interpose the defense that he was a bona fide purchaser of stock represented to him as fully paid up, where it appears that, after the original stock was duly subscribed by the promoters, part of it was turned into the treasury as treasury stock to be sold as the needs of the company required, and that defendant purchased part of such treasury stock at one-fourth its par value after fully going into the financial affairs of the corporation, and part of it after becoming a trustee of the corporation, since he is not a bona fide purchaser without notice.

Appeal from a judgment of the superior court for King county, Belt, J., entered June 27, 1904, upon the findings and decision of the court in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon an assessment on unpaid stock in an insolvent corporation. Affirmed.

John E. Humphries and *Harrison Bostwick*, for appellant, cited: *Cook, Stock and Stockholders* (3rd ed.), pp. 80-82; *Brant v. Ehlen*, 59 Md. 1; *Rood v. Whorton*, 67

¹Reported in 79 Pac. 206.

Fed. 434; *Steacy v. Little Rock etc. R. Co.*, 5 Dill 348; *West Nashville etc. Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 S. W. 340, 6 Am. St. 835; *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814; *Wintringham v. Rosenthal*, 25 Hun 580; *Erskine v. Loewenstein*, 82 Mo. 301; *Johnson v. Lullman*, 15 Mo. App. 55.

Allen, Allen & Stratton, for respondent, to the point that defendant was not a bona fide purchaser, cited: *Wis hard v. Hansen*, 99 Iowa 307, 68 N. W. 691, 61 Am. St. 238; *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551; *Tul hill Spring Co. v. Smith*, 90 Iowa 331, 57 N. W. 853; *Gilkie etc. Co. v. Dawson etc. Co.*, 46 Neb. 333; 64 N. W. 978, 1097; *Tulare Sav. Bank v. Talbot*, 131 Cal. 45, 63 Pac. 172.

PER CURIAM.—Plaintiff brought this action in the court below as trustee in bankruptcy of an insolvent corporation, to recover from the defendant the amount of a levy made by the bankruptcy court on the corporate stock held by the defendant.

The following facts are admitted by stipulation of the parties, namely: that the North Pacific Window Glass & Bottle Company is a corporation; that such corporation has been duly adjudged a bankrupt; that the plaintiff has been regularly appointed trustee; that all the assets of the insolvent corporation have been reduced to cash, and the proceeds applied under the direction of the bankruptcy court; that there is a large deficit, to cover which the bankruptcy court has duly levied an assessment of thirty-five per cent of the par value of the capital stock; and that the defendant is the owner of forty-seven shares of such stock of the par value of \$4,700, only twenty-five per cent of which has been paid in, and has refused to pay the assessment.

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Opinion Per Curiam.

The sole defense relied upon is, that the defendant is a bona fide purchaser of the stock held by him; that his vendor represented to him at the time of sale that the stock was fully paid up and non-assessable; and that he believed this representation to be true. The facts in relation to the acquisition of this stock by the defendant are as follows: The entire capital stock, consisting of 1,000 shares of the par value of \$100,000, was duly subscribed by E. A. McKay, G. W. Carter, and F. A. Rea. Sometime thereafter 332 shares, subscribed by each of the promoters, or 996 shares in all, were turned into the treasury of the corporation as treasury stock, to be sold from time to time as the needs of the company might require. A certificate for thirty-five of these shares was issued to the defendant under date of December 5, 1901, and a second certificate for an additional twelve shares under date of November 13, 1902. The sale of both lots was made through E. A. McKay, president of the company, and the purchase money of \$25 per share was, in each instance, paid into the treasury of the corporation. Both sales were made for the express purpose of raising money to enable the corporation to carry out the objects of its creation.

At the time of the first issue of stock, the financial affairs of the corporation, its property, its resources, its assets and liabilities were fully gone into between the president of the corporation and the defendant, and, in the nature of things, the defendant knew, or should have known, that the capital stock of the company had not been paid in. In addition to this, at the time the last twelve shares were issued to the defendant, he was one of the trustees of the corporation, participating in the management of its affairs. Under these circumstances, he is not

a bona fide purchaser without notice, within the rule contended for by his counsel, assuming, without deciding, that such defense is a valid one.

For the foregoing reasons, the judgment of the court below in favor of the plaintiff is affirmed.

[No. 5000. Decided January 17, 1905.]

ANNIE BETTINGER, *Appellant*, v. MICHAEL C. SCULLY,
Respondent.¹

PRINCIPAL AND SURETY—JOINT NOTE—CLAIM THAT JOINT MAKER WAS SURETY ONLY—EVIDENCE—SUFFICIENCY—NONSUIT. In an action by the assignee of a joint maker of a note claimed to be a surety only and who paid the note in full, to recover of the co-maker, S, the amount so paid, there is no sufficient evidence of the suretyship to warrant a recovery where it merely appears that S received the money on depositing the note in a bank and that the plaintiff's assignor paid the note, especially after the lapse of twelve years after the transaction, and the death of plaintiff's assignor.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 20, 1903, upon findings in favor of the defendant, dismissing on the merits an action on a promissory note paid by one of the two joint makers, after a trial before the court without a jury. Affirmed.

Jno. G. Gray and Byers & Byers, for appellant.

Roberts & Leehey and E. P. Moran, for respondent.

FULLERTON, J.—The appellant instituted this action to recover upon a promissory note, alleging, substantially, that the note in question was executed by the appellant and her husband, George Bettinger, as joint makers, to

¹Reported in 79 Pac. 203.

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Opinion Per FULLERTON, J.

the Park City Bank, but that in fact her husband was only surety thereon; that her husband afterwards paid the note in full to one D. C. McLaughlin, who had been appointed by the court receiver of the bank; that the receiver thereupon assigned the note to her husband, who subsequently assigned it to her. Demand and nonpayment were alleged; also, facts tending to avoid the statute of limitation, as otherwise the note appeared to be barred on its face. The answer put in issue the main allegations of the complaint, and affirmatively plead the statute of limitations and payment; the affirmative matter was put in issue by a reply. The cause was tried before the court without a jury, resulting in a judgment for the respondent.

Counsel discuss at some length the question whether the appellant has a cause of action upon the note itself, or upon the implied promise of the principal to repay the amount which the surety was compelled to pay to take up the note, but this question, if it can be said to be properly raised by the record, we have found unnecessary to determine. The trial court found that the evidence did not justify a recovery, even if it be conceded that the appellant's contention is the correct one, and we think the conclusion the only one that can be drawn from the evidence. Bettinger is dead, and the respondent, Scully, was not permitted to testify. The copy of the note, set out in the record—the original was accidentally destroyed—shows it to have been a joint note, not even joint and several. The evidence shows that Scully took this note to the bank, and took credit in his deposit account with the bank for its entire proceeds, and that Bettinger afterwards paid the note out of his own funds to the bank. This is, in substance, the whole of the testimony.

To our minds it falls far short of proving that Bettinger was a mere surety on the note, or that he paid any obligation, when he paid it, that should have been paid by the respondent. While it may be true that the nature of the transaction gives color to the idea of principal and surety, it will not do to rely too much on the natural order of things, or the presumptions that arise therefrom, especially, as in this case, when nearly a dozen years have elapsed since the transactions occurred. Men do business in multifarious ways, and the real transaction is oftentimes different from what might be inferred from the mere written evidence. For example, in this case it may be that Bettinger owed the respondent the money represented by the note, and was but paying his own debt when he paid it; or it may be that the parties were engaged in a joint enterprise, and the note was what on its face it purported to be, a joint note; or it may be that it was, as the appellant contends it to be, the note of Scully; either idea is not inconsistent with the proofs, while only the latter would permit a recovery in full, and the first would defeat recovery altogether. The proofs, to warrant a recovery, must be reasonably definite and certain, and they are not so here. The judgment is affirmed.

MOUNT, C. J., and DUNBAR and HADLEY, JJ., concur.

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Opinion Per Curiam.

[No. 5055. Decided January 17, 1905.]

**MARSTON TEBBETTS, as Receiver of the Blue Star
Navigation Company, Respondent, v. NORTHERN
COMMERCIAL COMPANY, Appellant.**¹

CONVERSION—DEFENSES—VENDEE OF PROPERTY WRONGFULLY CONVEYED—ASSUMPTION OF VENDOR'S OBLIGATIONS—PLEADINGS—AMENDMENTS. In an action to recover the value of a building which had been converted by a third party and sold to the defendant, who refused on demand to return it or pay its value, it is not error to refuse to permit the defendant to amend its answer to show that it had not assumed the obligations of its vendor, since such fact was immaterial and no defense to the action.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 5, 1903, upon a verdict of the jury rendered in favor of the plaintiff in an action of conversion. Affirmed.

Hugh A. Tait and John G. Gray, for appellant.

Charles E. Patterson, for respondent.

PER CURIAM.—The respondent instituted this action to recover from the appellant the value of a certain building, which he alleged in his complaint belonged to the corporation of which he was receiver, and which a corporation known as the Alaska Exploration Company had wrongfully and without right torn down and appropriated, and afterwards conveyed to the appellant. It was also alleged that demand for the return of the property or its value had been made upon the appellant, and that it had refused to either return the property or pay its value. The appellant, for answer, admitted the taking of the property by its predecessor in interest, and a conveyance of the property to it, and set out some four sepa-

¹Reported in 79 Pac. 203.

rate defenses, in each of which it alleged the taking and appropriation of the property, but sought to justify such taking and appropriation by facts therein set out. Issue was taken on the facts sought to show justification, and a trial of such issue entered upon before a jury. During the course of the trial, and after the respondent had rested his case, the appellant asked to be permitted to amend its answer so as to deny an allegation of the complaint to the effect that it had assumed the obligations of the Alaska Exploration Company, an allegation which it had admitted in its answer as filed. The request was denied, and this denial constitutes the sole error assigned on this appeal.

In our opinion there was no error in the ruling of the trial court. It appears from the record that the Alaska Exploration Company wrongfully and without consent of the owner took possession of, and appropriated to its own use, a building belonging to the corporation of which the respondent is receiver; that it sold the building to the appellant; and that the appellant entered into possession of it, and refused to deliver it up or pay its value to the respondent, on demand being made upon it therefor. This being true, the question whether or not the appellant assumed the obligations of the Alaska Exploration Company is immaterial. As that company came wrongfully into possession of the building, it could give no rightful possession to the appellant. It was the appellant's duty, therefore, to deliver up the building on the demand of the respondent, and, refusing to do so, it became liable as for its own wrong.

The judgment should be affirmed, and it is so ordered.

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Syllabus.

[No. 5449. Decided January 18, 1904.]

JENNIE M. KNAPP, *Respondent*, v. THE ORDER OF
PENDO, a *Mutual Benefit Association*, *Appellant*.¹

36	601
37	111
38	601
139	100
39	253

TRIAL—BY JURY—FAILING TO DEMAND WHEN SET FOR TRIAL—DISCRETION. It is discretionary to award a jury trial although the same was not demanded when the case was set for trial in the manner required by Laws, 1903, p. 50, and error cannot be predicated thereon.

PLEADINGS—AMENDMENT—SUPPLEMENTAL COMPLAINT. It is proper to allow the filing of a supplemental complaint to include a demand for monthly installments accruing to the plaintiff since the commencement of the action, one year before the trial was had.

DISCOVERY—INTERROGATORIES—ANSWER—SUFFICIENCY—DISMISSAL OF ACTION. It is not error to refuse to strike a complaint and dismiss the action for refusing to answer interrogatories, where they were answered as soon as objections were disposed of; and, if not sufficiently full and explicit, the remedy is by motion to make more specific.

TRIAL—NONSUIT—REOPENING CASE. It is discretionary to deny a motion for nonsuit, and reopen the case for further testimony.

BENEFICIAL ASSOCIATIONS—ACTION ON BENEFIT CERTIFICATE—DEFENSES—DEMANDING BLANKS FOR PROOF OF DEATH. In an action by a widow on a benefit certificate in a mutual association, it is not reversible error to permit the plaintiff to prove a written demand for blanks upon which to submit proof of death, there being no obligation to furnish them, where it appears that plaintiff was under no obligation to furnish proof of death, since the matter is irrelevant and without prejudice.

SAME—NONSUIT—EVIDENCE—SUFFICIENCY. In such a case it is not error to deny a motion for nonsuit for failure to prove the truth of statements contained in the application for membership, since their falsity was matter of defense; nor for other insufficiency in the evidence; where it appears that all dues were paid, that it was the duty of the local secretary to present the claim for a death loss, and that all remedies in the order had been exhausted.

APPEAL AND ERROR—REVIEW—OBJECTIONS. The supreme court will not consider objections to evidence not made below.

¹Reported in 79 Pac. 209.

Opinion Per RUDKIN, J.

[36 Wash.

APPEAL AND ERROR—EVIDENCE OF ADMITTED FACTS. It is not prejudicial error to exclude evidence of the verdict of a coroner's jury which could only tend to prove admitted facts.

APPEAL—REVIEW—EXCLUDING EVIDENCE—HARMLESS ERROR. It is not reversible error to permit cross-examination on a subject not gone into on the examination-in-chief, where the party might have obtained the same testimony in rebuttal.

CONTINUANCE—DISCRETION OF COURT. The denial of an application for a continuance to enable the defense to procure an original paper is not error where no abuse of discretion is shown.

BENEFICIAL ASSOCIATIONS—ACTION ON BENEFIT CERTIFICATE—DEFENSE OF SUICIDAL DEATH—INSANITY—INSTRUCTIONS. In an action on a benefit certificate in a mutual association, which provided that there should be no liability in the event of death of a member by suicide, and it is claimed that the suicide was due to the member's insanity, it is proper to instruct that there is no liability if the deceased was in the possession of his ordinary faculties, but that the liability does attach if the suicide, although intentional, was committed while the reasoning faculties were so far impaired that he could not understand the character and effect of the act, or if he was impelled thereto by an insane impulse which he could not resist.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered July 22, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon a benefit certificate upon the death of a member of a mutual benefit association. Affirmed.

Reynolds & Stewart, for appellant.

Govnor Teats and J. R. Buxton, for respondent.

RUDKIN, J.—On the 17th day of April, 1902, the defendant, a mutual benefit association, organized and existing under the laws of the state of California, with branches, known as lodges or councils, in the state of Washington, issued and delivered to David Knapp, since deceased, a certificate of membership in the relief fund of said order, payable to plaintiff herein as widow of said

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Opinion Per RUDKIN, J.

deceased, conditioned, among other things, for the payment of a funeral benefit of \$75, and a further monthly pension of \$20 per month for a period of ten years, in the event of the death of said member. Said certificate was issued upon the express condition that the statements made by the applicant in his application for such certificate of membership were true. The constitution and by-laws of the order, which were made a part of the certificate, further provide, "that in the event of the death of any member by suicide during the first year of membership, his or her beneficiary shall not be entitled to recover any benefits whatever."

The complaint was the usual form in such cases. The answer, in addition to the denials, alleged affirmatively that the deceased, in his application for membership, stated that he had never been addicted to the excessive use of malt or alcoholic stimulants, which statement was false and untrue; and, second, that the deceased came to his death within one year from the issuance of the certificate, and that his death was caused by his own voluntary, wilful, and unlawful act. The reply denied the affirmative parts of the answer, and alleged that, if the death of the said Knapp was caused by his own act, such act was not voluntary or wilful, but was the result of insanity and mental derangement. A verdict was rendered for plaintiff on the trial, and, from the judgment entered thereon, this appeal is taken. We will now briefly consider the numerous errors assigned.

(1) That the court erred in awarding the plaintiff a jury trial, for the reason that a demand therefor was not made and the jury fee paid at the time the case was called to be set for trial, as required by the act of March 6, 1903, Laws 1903, p. 50. It is within the discretion

of the trial court to permit a demand for a jury to be made after the case is called to be set for trial, or to submit the issues of fact in a case to a jury of its own motion, and no error can be predicated upon its ruling in that regard.

(2) That the court erred in allowing the filing of a supplemental complaint. The action was not brought on for trial for about a year after its commencement. The court allowed a supplemental complaint to be filed, including the monthly installments which accrued after the commencement of the original action. The right to recover these installments followed the right of recovery in the main action as a matter of course, and the filing of the supplemental complaint was properly allowed.

(3) That the court erred in refusing to strike the complaint and dismiss the action for the refusal of plaintiff to answer certain interrogatories propounded to her. The plaintiff objected to interrogatory number 9, for the reason that the same was immaterial and irrelevant. As soon as this objection was disposed of by the court, the interrogatory was answered. This was a sufficient compliance with the statute. Interrogatory number 11 was answered, and, if the answer was not sufficiently full and explicit, the remedy was by motion to require a more specific answer, and not by motion to dismiss. The motion to dismiss was properly overruled.

(4) The fourth and fifth assignments relate to the refusal of the court to grant the motion for a nonsuit when first interposed, and in reopening the case to admit further proof on the part of the plaintiff. This is a common practice, and was clearly within the discretion of the trial court.

(5) That the court erred in admitting in evidence a copy of a written demand for blanks upon which to submit

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proof of death. In support of this assignment, the appellant claims that the local lodge was under no obligation to furnish these blanks. This seems to be true, but it is equally true that the plaintiff was under no obligation to furnish proof of her claim. This duty is imposed upon the secretary of the local lodge. The offer was wholly irrelevant, and no prejudice or injury resulted therefrom.

(6) That the court erred in overruling the motion for nonsuit. It was not incumbent upon the plaintiff to prove that the statements contained in the application for membership were true. If false, this was matter of defense. There was evidence that all dues had been paid; the duty of presenting the claim to the supreme secretary was imposed upon the secretary of the local lodge and not upon the plaintiff, and we think it sufficiently appears that all remedies within the order had been exhausted, and that further appeal to the order would be useless, if these were material facts. There was no merit in the motion, and the same was properly denied.

(7) No sufficient objection was made to the testimony referred to in the eighth assignment, and this court will not consider it.

(8) The verdict of the coroner's jury, if admitted, could only prove that the deceased came to his death by his own hand, and this was an admitted fact in the case.

(9) The witness Rosa Carver, on her direct examination, was not interrogated as to the sanity of the deceased, or upon any subject connected therewith. The question, asked her on cross-examination as to the sanity of the deceased and as to his actions and conduct, was not proper cross-examination, and the objection should have been sustained upon that ground. But, inasmuch as the witness might have given the same testimony in rebuttal, the rul-

ing is not of sufficient moment to warrant a reversal of the judgment.

(10) The application for a continuance in the midst of the trial, to enable the defense to obtain and produce the original application, was addressed to the sound discretion of the trial court, and no abuse is shown.

(11) The first and fourth instructions given by the court of its own motion, and the third and fourth given at the request of the plaintiff, each of which was excepted to by the defendant, state the law correctly and it would serve no useful purpose to set them out at length in this opinion. The ninth instruction was properly refused, as it was not the duty of the plaintiff to file her claim with the supreme secretary of the order for the reasons already stated.

The second instruction given by the court, and the sixth, seventh, and eighth instructions requested by the defendant bore upon the question of suicide and insanity. Upon this question the court instructed the jury as follows:

"If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or desire to escape from the ills of life, intentionally takes his own life, the proviso attaches and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the defendant is liable."

The above instruction is in the language of the supreme court of the United States in the case of *Life Insurance Co. v. Terry*, 15 Wall. 580, and meets with the approval of this court. See, also, *Blackstone v. Standard Life etc.*

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Citations of Counsel.

Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486, and cases there cited. There was no error in the giving or refusing of instructions.

The other assignments are not well taken, and deserve no special comment. Finding no reversible error in the record, the judgment of the court below is affirmed.

MOUNT, C. J., and FULLERTON, DUNBAR, and HADLEY, JJ., concur.

[No. 5284. Decided January 21, 1905.]

THE STATE OF WASHINGTON, *on the Relation of Prosser Falls Land and Irrigation Company, Respondent,*
v. E. W. R. TAYLOR, *Appellant.*¹

MUNICIPAL CORPORATIONS—POWERS—GRANTING FRANCHISES FOR LIGHT PLANTS. A city of the fourth class is authorized to pass an ordinance granting an electric light and power franchise; even although a previous franchise which was not exclusive had been granted to another party.

MUNICIPAL CORPORATIONS—CITY OF FOURTH CLASS—ORDINANCES—MAYOR'S DUTY TO SIGN—VETO—MANDAMUS, WHEN LIES. The charter of cities of the fourth class gives the mayor no veto or discretionary power, with reference to signing ordinances, and under Bal. Code, § 1012, providing that every ordinance of a city of the fourth class shall be signed by the mayor, mandamus lies to compel the mayor to sign an ordinance duly passed by the council, since his duties depend entirely upon the charter provisions.

Appeal from a judgment of the superior court for Yakima county, Rudkin, J., entered April 13, 1904, upon sustaining a demurrer to an answer, directing the issuance of a writ of mandamus, as prayed for. Affirmed.

Snyder & Preble and *H. J. Snively* for appellant, to the point that the mayor's signature is required to indicate his approval, and is essential, cited: *Bills v. Goshen*, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261; *Chicago etc. R.*

¹Reported in 79 Pac. 286.

Co. v. Council Bluffs, 109 Iowa 425, 80 N. W. 564; *Altman v. Dubuque*, 111 Iowa 105, 82 N. W. 461; *Heins v. Lincoln*, 102 Iowa 69, 71 N. W. 189; *Moore v. Perry*, 119 Iowa 423, 93 N. W. 510.

Whitson & Parker, for respondent.

DUNBAR, J.—This is a special proceeding, prosecuted by the relator, Prosser Falls Land and Irrigation Company, against the defendant, as mayor of the town of Prosser, a city of the fourth class, to compel him, by writ of mandamus, to sign a proposed ordinance of said town passed by its city council, granting to said relator a franchise to erect and maintain electric light and electric power plants in said city and to erect and maintain in the public streets thereof poles, wires, and other fixtures for furnishing electric light and electric power. After setting forth the ordinance, the petition alleged that the mayor refused to sign the same, and prayed that a writ issue to compel him to sign said ordinance. To this petition the defendant answered. The plaintiff demurred generally to defendant's answer to the petition for said writ of mandamus, which demurrer was sustained. Judgment was entered, requiring appellant to sign the said proposed ordinance, and directing that a writ of mandamus issue to that end. The proceeding is in this court, upon appeal by said defendant from said judgment.

The petition set out the ordinance, which is too lengthy to reproduce here—in fact, there is no contention over the form of the ordinance, the answer being that the city had no power to pass such an ordinance, it being beyond the scope of its authority—and alleges that the mayor was not compelled under the charter to sign such ordinance, but that the charter provision requiring him to sign the ordinances contemplated an approval by him of the ordi-

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nance before the signing; that the act was not a ministerial act, but one of discretion. The answer further alleged, in defense of the mayor, the fact that certain other franchises had, at a prior time, been granted to one Thompson. We think, without entering into a specific discussion of the question, that ample authority is given by the charter to the city council to pass the ordinance that it did pass. And there is no merit in the further answer that a similar franchise had been granted to Thompson, for it does not appear that an exclusive franchise had been granted to any one, even if the city had power to grant such a franchise. The main contention of the appellant is that the charter of the town of Prosser, to wit, the general law governing cities of the fourth class, vests in the mayor power to withhold his signature to any proposed ordinance. Section 1012, Bal. Code, which is the section governing in this respect cities and towns of the fourth class, is as follows:

“ . . . Every ordinance shall be signed by the mayor, attested by the clerk, and published at least once in a newspaper published in such town, or printed and posted in at least three public places therein.”

It is insisted by the appellant that, inasmuch as the statute provides for the attestation of the ordinance by the clerk, it is evidently not the purpose of the statute, in providing for the mayor's signing the said ordinance, that it also shall be for the purpose of attestation, and that a contrast is drawn between the mayor's signing and the clerk's attesting. It is also insisted that, if it were a fact that the mayor has no legal authority to approve ordinances, and therefore he acts in a ministerial capacity, only, in signing them, then the alleged ordinance in question is absolutely void for the reason that its going into effect is expressly contingent upon its approval by the mayor. But

rate defenses, in each of which it alleged the taking and appropriation of the property, but sought to justify such taking and appropriation by facts therein set out. Issue was taken on the facts sought to show justification, and a trial of such issue entered upon before a jury. During the course of the trial, and after the respondent had rested his case, the appellant asked to be permitted to amend its answer so as to deny an allegation of the complaint to the effect that it had assumed the obligations of the Alaska Exploration Company, an allegation which it had admitted in its answer as filed. The request was denied, and this denial constitutes the sole error assigned on this appeal.

In our opinion there was no error in the ruling of the trial court. It appears from the record that the Alaska Exploration Company wrongfully and without consent of the owner took possession of, and appropriated to its own use, a building belonging to the corporation of which the respondent is receiver; that it sold the building to the appellant; and that the appellant entered into possession of it, and refused to deliver it up or pay its value to the respondent, on demand being made upon it therefor. This being true, the question whether or not the appellant assumed the obligations of the Alaska Exploration Company is immaterial. As that company came wrongfully into possession of the building, it could give no rightful possession to the appellant. It was the appellant's duty, therefore, to deliver up the building on the demand of the respondent, and, refusing to do so, it became liable as for its own wrong.

The judgment should be affirmed, and it is so ordered.

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Syllabus.

[No. 5292. Decided January 21, 1905.]

J. EMIL HERZOG, *Respondent*, v. THE PALATINE INSURANCE COMPANY, LIMITED, OF LINCOLN, ENGLAND,
Appellant, and ALEXANDER THOMPSON
et al., *Defendants*.¹

APPEAL—DISMISSAL—TIME OF TAKING — JUDGMENT — ENTRY — ESTOPPEL. Where the clerk of court makes an informal journal entry of judgment upon a verdict, and a new trial is denied, affirming the judgment, the successful party by subsequently entering a formal judgment is estopped from asserting that the same is not the final judgment in the case, and an appeal therefrom will not be dismissed because not taken within 90 days from the date of the clerk's journal entry or from the date of the order denying the new trial.

APPEAL—IMMATERIAL EVIDENCE—WHEN HARMLESS. Error cannot be predicated upon the admission of evidence which was not material or prejudicial.

INSURANCE—APPORTIONMENT ON SPECIFIC ARTICLES—BREACH OF POLICY AS TO PART—FALSE STATEMENTS—FRAUD. The mere fact that a policy of fire insurance on a hotel building and contents specifies \$200 insurance on a piano when there was no piano in the building, does not vitiate the policy as to the other items of the insurance, in the absence of all proof as to how the piano was included, since fraud will not be presumed, and a breach of the policy as to one class of property does not avoid the policy as to the other parts in the absence of fraud, act condemned by public policy, or increase of risk.

SAME—MISTAKE. That the piano was included by mistake and so there was no meeting of the minds of the parties, does not affect the insurance on the building as to which there was no mistake.

SAME—PROOF OF LOSS—FALSE SWEARING. False swearing in the proof of loss in order to avoid a policy must relate to material matters, and the jury's verdict thereon, when supported by testimony, is conclusive.

INSURANCE—INTEREST OF INSURED—MORTGAGEE OF BUILDING—INSURANCE ON CONTENTS—FAILURE OF PROOF AS TO INTEREST IN

¹Reported in 79 Pac. 287.

PERSONAL PROPERTY. In an action brought by a mortgagee of a hotel building upon a policy of fire insurance made payable to him "as his interest may appear," and calling for \$2,000 on the building and \$300 on certain contents, there is a total failure of proof as to plaintiff's interest in the personal property, where his mortgage for \$2,500 was on the real estate only, and a judgment for \$2,300, will be reduced as excessive to the extent of the \$300.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered March 11, 1904, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon a policy of fire insurance. Modified.

H. T. Granger, for appellant. The breach in regard to the piano rendered the entire policy void. *McWilliams v. Cascade Fire etc. Ins. Co.*, 7 Wash. 48, 34 Pac. 140; *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. 393; *Germania Fire Ins. Co. v. Schild*, 69 Ohio St. 136, 68 N. E. 706; *Planters' Mut. Ins. Co. v. Loyd* (Ark.), 75 S. W. 725. If the piano was included by mistake, the minds of the parties never met. *Insurance Co. v. Young's Administrator*, 23 Wall 85; *Utley v. Donaldson*, 4 Otto 29; *National Bank v. Hall*, 11 Otto 43; *Goddard v. Monitor etc. Ins. Co.*, 108 Mass. 56, 11 Am. Rep. 307. Respondent had no interest in the insurance on the personal property. *Wilcox v. Mutual Fire Ins. Co.*, 81 Minn. 478, 84 N. W. 334. The false swearing in the proof of loss avoided the policy. *Knop v. National Fire Ins. Co.*, 107 Mich. 323, 65 N. W. 228; *Fowler v. Phoenix Ins. Co.*, 35 Ore. 559, 57 Pac. 421; *Dumas v. Northwestern Nat. Ins. Co.*, 12 App. D. C. 245; *Vaughan v. Virginia etc. Ins. Co.* (Va.), 46 S. E. 692.

Marshall K. Snell and *Bertha M. Snell*, for respondents. The appeal was not taken within 90 days from the entry of judgment, or the order denying a new trial, and should be dismissed. *Rice Fisheries Co. v. Pacific Realty Co.*, 35

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Wash. 535, 77 Pac. 839; *State ex rel. Hennessy v. Huston*, 32 Wash. 154, 72 Pac. 1015; *Hennessy v. Tacoma Smelting etc. Co.*, 33 Wash. 423, 74 Pac. 584; *Prospectors' Development Co. v. Brook*, 32 Wash. 315, 73 Pac. 376; *Quareles v. Seattle*, 26 Wash. 226, 66 Pac. 389; *Barthrop v. Tucker*, 29 Wash. 666, 70 Pac. 120; 2 Ency. Plead. & Prac., p. 241. The journal entry was a final judgment. 18 Ency. Plead. & Prac., p. 431; *Lanier v. Richardson*, 72 Ala. 134; Freeman, Judgments, (3d ed.), §50; 1 Black, Judgments, p. 129; *Hays v. Dennis*, 11 Wash. 360, 39 Pac. 658; *Harvey v. Whitlatch*, 1 Mont. 713; *Lynch v. Rome Gas Light Co.*, 42 Barb. (N. Y.) 591. Appellants' application for an extension of time to file a statement of facts shows their actual notice of the judgment. *Zindorf Const. Co. v. Western Am. Co.*, 27 Wash. 31, 67 Pac. 374; *Braely v. Marks*, 13 Wash. 224, 43 Pac. 27; *McQuesten v. Morrill*, 12 Wash. 335, 41 Pac. 56. Whether the false swearing was intentional or material was properly left to the jury. *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609; *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155, 47 Pac. 507, 58 Am. St. 26; *Washington Mills etc. Co. v. Weymouth etc. Co.*, 135 Mass. 503; *Arthur v. Palatine Ins. Co.*, 35 Ore. 27, 57 Pac. 62; *Fowler v. Phoenix Ins. Co.*, 35 Ore. 559, 57 Pac. 421; *Manchester Fire Assur. Co. v. Abrams*, 89 Fed. 932; *Ley v. Metropolitan Life Ins. Co.*, 120 Iowa 203, 94 N. W. 568; *Miller v. Delaware Ins. Co. (Okl.)*, 75 Pac. 1121.

RUDKIN, J.—On the 19th day of August, 1901, the defendant, the Palatine Insurance Company, Limited, issued to the defendants Thompson, Hill, and Shreeder its certain policy of insurance for \$2,500, distributed as follows:

\$2,000 on a certain hotel building, \$300 on the furniture and fixtures, and \$200 on the piano, all while contained in the hotel building. The policy was written without any written application therefor, and the loss, if any, was made payable to the plaintiff Herzog "as his interest might appear." On the 10th day of August, 1902, and during the life of the policy, the hotel building and furniture were destroyed by fire. At the time of the insurance, and at the time of the destruction of the property, the plaintiff held a mortgage on the hotel building to secure a sum in excess of \$2,500, due from the defendants Thompson, Hill, and Shreeder on account of the purchase price of the property. The amended complaint, on which the action was tried, set out the policy, the destruction of the property by fire, and the refusal of the insurance company to pay the loss. The amended complaint further alleged, that, some time prior to the issuance of the policy, one Amy, president of the Fidelity Rent and Collection Company, the agent of the defendant insurance company, solicited the defendants Thompson, Hill, and Shreeder to write insurance on said property; that it was the intent and understanding of the plaintiff and the defendants Thompson, Hill, and Shreeder that the \$2,500 insurance on the property should be apportioned as follows: \$2,000 on the hotel building, and \$500 on the furniture and fixtures therein contained, which intent and understanding were well known to the defendant insurance company, through its agent; that the plaintiff relied upon the defendant insurance company to so write the policy of insurance, but that the insurance company did, through its agent, write the policy of insurance distributing the same as hereinbefore stated, though the said Thompson, Hill, and Shreeder owned no piano at the time of the issuance of the policy, did not intend to insure a

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piano, and no piano was in the building at the time of its destruction; that no loss was ever claimed on account of the piano; and that the insured did not discover that a piano was actually included within the policy until after the destruction of the property, for the reason that the policy was turned over to the attorney for the plaintiff immediately upon its issuance, to be held with the other securities against the property.

After denying portions of the complaint, the answer of the insurance company alleged affirmatively, first, that the policy contained a provision that "this entire policy shall be void if the interest of the insured in the property be not truly stated herein;" that the piano referred to was not the property of the insured, and was placed in the building, at, or shortly after, the date of insurance, and contained therein until about Decemebr 19, 1901, and that, by reason of these facts, the entire policy became void; second, that the policy contained the further provision that "this entire policy shall be void in the case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss;" that, in the proofs of loss furnished to defendant insurance company on the 19th day of August, 1902, the defendants Thompson, Hill, and Shreeder claimed, under oath, that they were the owners of the piano insured, and that it was saved from the hotel building, which statements were knowingly and wilfully false; and third, that the property insured was wilfully and wrongly destroyed by the insured. The last affirmative defense is abandoned in this court. A verdict in favor of the plaintiff for \$2,376 was returned, and from the judgment entered thereon the defendant insurance company appeals.

On Motion to dismiss.

The respondent, Herzog, moved to dismiss the appeal, for the reason that the same was not prosecuted within the time limited by law. The verdict was returned and filed in the court below on February 11, 1904. The clerk's record of that day shows the following entry: "Judgment entered on verdict by clerk of the court." February 19th an order was entered overruling a motion for a new trial, and affirming the judgment on the verdict. March 10th a formal judgment was prepared by counsel for respondent, signed by the trial judge, and entered of record. We will not discuss the question whether the meager entry made by the clerk, or the informal order of the court denying the motion for a new trial, constitutes a final judgment from which an appeal might be taken. We think that, when the respondent entered the formal judgment of March 10th, he forever estopped himself to assert that it was not the final judgment in the cause from which the appeal should be prosecuted. It matters not whether this judgment was entered on the 10th or 11th of March. The judgment is otherwise sufficiently described in the notice of appeal. The motion to dismiss is therefore denied.

On the Merits.

The first and second assignments of error relate to the admission and exclusion of evidence. A reference to the transcript fails to show that the court made the ruling complained of in the first assignment. The court allowed considerable latitude in the cross-examination of the witness Spalt, referred to in the second assignment, but the answer to the question objected to was immaterial and not prejudicial. The other assignments may be grouped

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under three heads: (1) The effect of including the piano in the policy, under the circumstances stated; (2) the effect of the false statements made in the proofs of loss; and (3) was the verdict excessive?

(1) The record fails to show how a piano came to be included in the policy. The agent who wrote the insurance died prior to the trial below, and the court, on motion of the appellant insurance company, struck from the record all testimony of other parties relating to their transactions with the deceased agent. In the absence of all proof, the court must, therefore, assume that the piano was included in the policy by mistake and not by design, as fraud will not be presumed under such circumstances. The appellant takes the broad ground that the simple fact that the piano was included in the policy, and was not owned by the insured, without more, avoids the entire policy, and cites us to the case of *McWilliams v. Cascade Fire Ins. Co.*, 7 Wash. 48, 34 Pac. 140. We cannot uphold this contention, and the case cited does not sustain it. In the *McWilliams* case the piano was knowingly and wilfully insured by the plaintiff, though she knew at the time that she was not the owner thereof. This was a fraud upon the insurance company, and it may be that a contract of this kind, which is fraudulent in part, is void *in toto*, but this question is not now before us, and we express no opinion thereon. The rule established by the great weight of authority, and the rule which we believe to be the correct one in such cases, is this: Where a policy of insurance is issued, covering different classes of property, and each class is insured for a specific sum, a breach of the contract of insurance as to one or more classes does not avoid the policy as to the other classes not affected by the breach, in the absence of fraud, act

condemned by public policy, or an increase of risk on the whole property insured, by reason of the breach as to a part. See, *German Ins. Co. v. York.*, 48 Kan. 488, 29 Pac. 586, 30 Am. St. 313; *Miller v. Delaware Ins. Co.* (Okl.), 75 Pac. 1121, and the numerous cases cited in the opinion of the court, all supporting the rule here announced. For the reason already stated, no fraud was shown in this case, no rule of public policy was violated, and the risk on the hotel building and furniture was in no manner increased or affected by the inclusion of the piano in the policy. It is further argued that, if the piano was included in the policy by mistake, then there was no meeting of the minds of the parties and therefore no contract. This argument cannot apply to the insurance on the hotel building in relation to which there was no mistake, and for reasons hereinafter stated that is the only question now before this court.

(2) False swearing to proofs of loss, in order to avoid a policy, must relate to material matter, and the false statements must be wilfully or carelessly made. All the circumstances attending the preparation and signing of the proofs of loss in this case were before the jury, their verdict is supported by the testimony, and is conclusive upon this court. For these reasons the demurrer to the amended complaint was properly overruled, and the challenges to the sufficiency of the testimony were properly denied.

(3) We are constrained to hold, however, that the verdict in this case was excessive. The policy was made payable to the respondent *as his interest might appear*. He had no interest in, or lien upon, the furniture and fixtures. His mortgage covered the hotel building, only, and his interest therein was the amount of his mortgage

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debt, which exceeded the \$2,000 insurance thereon. There was, therefore, a total failure of proof, so far as concerns his claim to the insurance on the personal property. *Wilcox v. Mut. Fire Ins. Co.*, 81 Minn. 478, 84 N. W. 335. Counsel for the respondent apparently concede this, but they urge that the rule does not apply in this case for two reasons; first, because the defendants Thompson, Hill, and Shreeder in their answer admit that the respondent is entitled to recover the full amount of the policy; second, because the point was not raised in the court below. It is scarcely necessary to say that the admissions in the answer of the defendants Thompson, Hill, and Shreeder do not bind the appellant insurance company, nor supply fatal defects in the proof as against the insurance company. We further think that the point was sufficiently raised in the court below, first, by an exception to the instruction of the court authorizing a verdict in favor of the respondent, Herzog, in the full sum of \$2,300; and second, by the motion for a new trial on the ground that the verdict was excessive. The appeal from the final judgment brings up for review the order denying the motion for a new trial. For the reason last stated, the judgment of the court below is reversed, and the cause remanded, with directions to enter a judgment in favor of the plaintiff, against the defendant insurance company, for the sum of \$2,000, with legal interest thereon from the 29th day of October, 1902, and for costs in that court. The appellant will recover its costs on this appeal.

MOUNT, C. J., and FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 5395. Decided January 26, 1905.]

GEORGE R. KERSTETTER *et al.*, Respondents, v. EMIL W.
THOMAS, Appellant.¹

MALICIOUS PROSECUTION—CHARGE OF DISORDERLY CONDUCT—DEFENSE OF INTOXICATION—EVIDENCE IN REBUTTAL. In an action for the malicious prosecution and arrest of plaintiff upon a charge of disorderly conduct, it is not necessary for the plaintiff to prove that he was not intoxicated at the time of his alleged violation of the ordinance, and where the question of such intoxication is raised by the testimony of the defendant, it is not error to permit the plaintiff to rebut it.

MALICIOUS PROSECUTION—DEFENSES—DISCHARGE—JURISDICTION OF JUSTICE OF THE PEACE—CHANGE OF VENUE—TRANSCRIPT OF DOCKET—EVIDENCE. In an action for a malicious prosecution of a charge before a justice of the peace, where a change of venue was had to the next nearest justice, the transcript of the docket, showing plaintiff's discharge, is properly admitted in evidence, where sufficient appears to show that such justice had acquired jurisdiction of the case.

SAME—COMPLAINT—SUFFICIENCY—OBJECTIONS FIRST MADE IN SUPREME COURT. In an action for the malicious prosecution of a charge before a justice of the peace, where a change of venue is had to one who is admitted to be the next nearest justice, the complaint cannot be objected to for the first time in the supreme court on the ground that it did not set forth the facts showing the jurisdiction of the last justice, where the properly certified records of the justices show the transfer was regularly made, technical accuracy not being required.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered March 24, 1904, upon findings in favor of the plaintiff, in an action for malicious prosecution, after a trial on the merits before the court without a jury. Affirmed.

George Dysart and Forney & Ponder, for appellant.
'rank Burch, for respondents.

¹Reported in 79 Pac. 290.

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Opinion Per DUNBAR, J.

DUNBAR, J.—This is a case brought by plaintiffs to recover damages for alleged malicious prosecution growing out of a criminal action wherein the appellant was the complaining witness. Upon the making and filing of a complaint before a justice of the peace, he issued a warrant for the arrest of the respondent, upon which the respondent was arrested and brought before the justice. He then filed his affidavit for a change of venue, which change of venue was granted, and the case transferred to E. K. Green, a justice of the peace in and for Clark precinct, Lewis county, Washington. The papers were duly transferred to Justice Green by Justice Miller, who was the police justice of the city of Centralia before whom the case was commenced. Upon receipt thereof, Justice Green docketed the case, and set the case for trial. Notice was issued to all the parties, including the prosecuting witness, notifying them of the place and time of the trial, and said notice was duly served and return thereof made. On the 17th day of June, 1903, the day of the trial, respondent appeared, and, after waiting a legal period of time, and no complaining witness appearing, and no one appearing on behalf of the prosecution, Justice Green dismissed the action for want of prosecution, and discharged the defendant, who is the respondent herein.

This action was commenced against the appellant to recover the sum of \$2,065 damages, and was tried before the court sitting without a jury. After hearing the evidence, the court gave judgment for the respondent, against appellant, for the sum of \$30 and costs.

It is assigned as error that the court erred in making certain findings of fact and conclusions of law drawn therefrom, and in refusing to find in accordance with the motion of the appellant. The fifth assignment is that

the court erred in admitting the testimony of Mrs. Kerstetter, in rebuttal, over the objections of defendant, in regard to the drunkenness of plaintiff, and it is alleged by the appellant that this testimony should have been excluded, under the rule in *Noblett v. Bartsch*, 31 Wash. 24, 71 Pac. 551. We do not understand that that case affects the question in controversy. *Noblett v. Bartsch* simply decided the fact that the fact that plaintiff, in an action for malicious prosecution, had been discharged from a criminal charge without a trial upon the merits, while sufficient to make a prima facie case, would not shift the burden of proof, in an action for damages, to the defendants. It was not necessary in this case to prove, in the original action, that the plaintiff was not intoxicated at the time of the alleged complaint filed by the defendant in this action. He may have been guilty of disorderly conduct, and have been perfectly sober, or he may have been intoxicated at that time, and not have been guilty of any disorderly conduct; and it was not necessary to prove affirmatively, for the purpose of making it a defense to the charge against him—which was one of disorderly conduct—that he was not at that time intoxicated. This was a matter which was raised by the testimony of the defendant in this case, and the plaintiff had a right to rebut it.

It is also objected that the court erred in receiving in evidence exhibit number 1, which relates to the proceedings of justice of the peace Green. It is insisted that this testimony was not material, from the fact that it did not show that the cause was transferred to Green, or that, when he acted to dismiss the case, he was holding court within his precinct. The testimony objected to, we think, was properly admitted. It is simply a transcript

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of the docket of the court, setting forth the proceedings of the court generally, and sufficient is shown, we think, to show that the court had jurisdiction.

Upon this, also, is based the contention that the complaint did not state a cause of action, in that it did not set forth jurisdictional facts which conferred jurisdiction upon Green, justice of the peace, to take cognizance of and determine the action in the city of Centralia. The jurisdiction of this case, it seems to us, is completely made up. The jurisdictional fact that Green was the justice of the peace in Centralia precinct was admitted upon the trial, and proof was not required. But the properly certified record of Justice Miller shows that the cause was transferred to Justice Green, who was the next nearest justice of the peace. The record seems to us to be, in all things, regular. The law does not require that the records of the justice of the peace shall be kept with that technical accuracy that is demanded of courts of record of common law jurisdiction. The complaint is the ordinary complaint in such cases. No demurrer was interposed to the complaint, and the record as a whole shows that the case was regularly transferred on motion for a change of venue; besides, this question as to the insufficiency of the complaint is raised for the first time here. We think the complaint is ample to sustain the judgment, and, even if there had been some irregularities in the complaint—which we are unable to discover—it is too late now for the respondent to take advantage of them. It was said in *Parli v. Reed*, 30 Kan. 534, 2 Pac. 635, in a case written by Justice Brewer, who is now a member of the supreme court of the United States, that,

“Where a party files a complaint upon which he causes the arrest of another for an alleged crime, it is no defense to an action for malicious prosecution that the complaint

was technically defective. So long as it was treated by the justice and officers as sufficient, and the defendant in fact arrested thereon, the party filing it is estopped from questioning its sufficiency."

The other assignments go to the sufficiency of the testimony to sustain the findings of fact. An examination of the record satisfies us that the facts were properly found, and that the conclusions of law are sustained by the facts. The judgment is affirmed.

MOUNT, C. J., and HADLEY and FULLERTON, JJ., concur.

[No. 5187. Decided January 26, 1905.]

SAMUEL SHOWALTER *et al.*, Appellants, v. HENRY M. SHOWALTER *et al.*, Respondents.¹

APPEAL AND ERROR—REVIEW—FINDINGS. In an action upon an alleged contract to purchase and hold lands for the use and benefit of plaintiff, findings for the defendants, dismissing the action, must be sustained where the only testimony was that of the plaintiff, who did not refer to the making of the contract or to any violation thereof.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered October 14, 1903, upon findings in favor of the defendants, after a trial before the court without a jury, dismissing on the merits an action of ejectment. Affirmed.

L. H. Prather, for appellants.

Poindexter & Kimball, for respondents.

DUNBAR, J.—The plaintiffs complain of defendants and allege, that on the — day of July, 1897, plaintiffs were the owners in fee simple of certain described land in Spo-

¹Not yet reported in Pac. Rep.

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Opinion Per DUNBAR, J.

kane county; that the same was mortgaged to the Provident Trust Company for the security of a loan by said company to plaintiffs of the sum of \$900; that in July, 1897, the company being about to bring suit to foreclose said mortgage, it was agreed by and between the plaintiffs, and Henry M. Showalter and Geo. W. Showalter, two sons of plaintiffs, that plaintiffs should make no defense against said suit, providing that said company would consent to buy in said land at the foreclosure sale, and agree to give the defendant Henry M. Showalter a contract under which he could purchase said land of said company on certain terms, and that said Henry M. Showalter should take the said contract in his name for the use and benefit of the plaintiffs, and that when the purchase price should be paid the said land should be the property of plaintiffs, and that during all the times then and thereafter the plaintiffs should remain in possession of said property and use the same as their own; that, in accordance with this outlined agreement, the property was bought in by the company and sold to Henry M. Showalter; that in March, 1901, while the plaintiffs were rightfully in possession of said land, the defendants, in violation of the agreement theretofore entered into, wrongfully, and by force and unbearable indignities, ousted plaintiffs from the possession of said land, and themselves, wrongfully and by force, took possession thereof, and still hold the same, to the plaintiffs' damage in the sum of \$1,000. The demand is for judgment for the possession of said land, and for the sum of \$1,000, and that the defendants Henry M. Showalter and Abbie Showalter, his wife, be required to execute and deliver a good and sufficient deed of conveyance to said land to the plaintiffs. The answer was a denial of all the essential allegations of the complaint.

The plaintiff, Samuel Showalter, testified in his own behalf. The plaintiff then rested his case. Whereupon the defendants moved the court for a judgment in their favor dismissing the action, and for their costs and disbursements, and, after having heard argument of counsel thereon and the matter being further considered, the court made certain findings of fact; which are to the effect that no agreement of any kind had been proven between the plaintiffs and defendants, or between the plaintiffs and the mortgagee, the Provident Trust Company; that the defendant Henry M. Showalter did not, with intent to defraud the plaintiffs, wrongfully and fraudulently procure a deed of conveyance to said property; that the said plaintiffs are not rightfully in possession of said land under and by virtue of said agreement, and that the defendants did not, by force or unbearable indignities, oust plaintiffs from the possession of said land to the damage of \$1,000, or any sum. The motion of the defendants was granted, and the cause dismissed, with costs and disbursements to be recovered from the plaintiffs, judgment was entered in accordance with the findings, and from such judgment this appeal is taken.

The defendants excepted to the findings of fact and conclusions of law, and excepted to the action of the court in refusing to make findings suggested by them. From a perusal of the record in this case, it is evident that no other findings could have been made than those made by the trial court. No testimony was offered except that of the plaintiff Samuel Showalter, who in his testimony did not refer, or attempt to refer, to the making of the contract set forth in the complaint, or to its violation in any particular. His testimony was simply a rambling, incoherent statement of domestic trouble between himself and his wife and his boys, and of alleged indiscretions of the

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boys in connection with other people, and upon subjects generally that had not the least relevancy or materiality to the issues made by the pleadings. The appeal seems to be totally without merit, and the judgment is therefore affirmed.

MOUNT, C. J., and HADLEY and FULLERTON, JJ., concur.

[No. 4548. Decided January 30, 1904.]

L. H. GRIFFITH, *Appellant*, v. SEATTLE CONSOLIDATED STREET RAILWAY COMPANY *et al.*, *Respondents*.¹

LIMITATIONS OF ACTIONS—RELIEF ON THE GROUND OF FRAUD—DISCOVERY OF FRAUD—COMPLAINT—SUFFICIENCY. An action by the holder of part of the bonds of a street railway corporation, seeking an accounting for certain property alleged to have been fraudulently abandoned to foreclosure sale, under a fraudulent reorganization scheme arranged by the defendant companies and their mortgagees, and the other bondholders, whereby the plaintiff, who was absent in Central America, was to be excluded from such reorganization by effecting the same before he could have actual knowledge thereof, is barred by the statute of limitations when it is not commenced until more than three years after the decree of foreclosure whereby the property passed into other hands, where the plaintiff admits actual knowledge of the foreclosure decree; and the allegation that he did not have knowledge of the reorganization scheme or of the fraudulent plan to exclude him therefrom and that the same were not discovered within the said statutory period, will not evade the effect of the averments showing actual notice of the real fraud, which consisted in abandoning the defenses and confessing the decree of foreclosure; since the plaintiff is not seeking participation in the reorganization, but an accounting in property sold to his prejudice, and to his knowledge for more than the statutory period.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 1, 1902, upon sustaining a demurrer to a complaint, dismissing an action for relief upon the ground of fraud. Affirmed.

¹Reported in 79 Pac. 314.

Sachs & Hale and *Bausman & Kelleher*, for appellant, cited: *Jackson v. Ludeling*, 21 Wall. 616; *Hackettstown Nat. Bank v. Yuengling Brewing Co.*, 74 Fed. 110; *Sahlgard v. Kennedy*, 2 Fed. 295; *Ervin v. Oregon etc. R. Co.*, 27 Fed. 625; *Meeker v. Winthrop Iron Co.*, 17 Fed. 48; *Barr v. New York etc. R. Co.*, 96 N. Y. 444; *Rogers v. Nashville etc. R. Co.*, 91 Fed. 299; *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; *Brewer v. Boston Theatre*, 104 Mass. 378; *Rothchild v. Memphis etc. R. Co.*, 113 Fed. 476; *Farmers' Loan etc. Co. v. New York etc. R. Co.*, 150 N. Y. 410, 44 N. E. 1043, 55 Am. St. 689, 34 L. R. A. 76.

Piles, Donworth & Howe (Thomas R. Shepard, of counsel), for respondents.

HADLEY, J.—By this action the appellant seeks relief from acts connected with what he alleges was as to him a fraudulent corporate reorganization scheme. His fourth amended complaint, upon which he stands, is now before us for review upon demurrer. The complaint is very long and avers many details. We shall endeavor to state, in as condensed a manner as practicable, what we understand to be facts appearing by the complaint which are necessary to an understanding of the case.

The corporate existence of the following is first alleged, namely: Seattle Electric Railway and Power Company, Seattle Consolidated Street Railway Company, the Seattle Traction Company, and the Seattle Electric Company, and said corporations are thereafter respectively mentioned in the complaint as "first company," "second company," "third company," and "present company." It further appears that on the 15th day of March, 1890, the

first company executed a deed of trust to the Illinois Trust and Savings Bank, a corporation. The said deed of trust, for brief reference, is mentioned throughout as the "first company's mortgage." By said mortgage the first company attempted to convey to said trustee all real and personal property of the mortgagor, consisting then of a line of street railway, and including both real and personal property in the city of Seattle. It is alleged that the mortgage was void as to the personal property for the reason that there was not attached to it an affidavit of good faith, as required by the laws of Washington; that the personal property and franchises of the first company were then of the value of \$1,000,000, and that said property has constantly increased in value from that time to the present. The mortgage was made to secure bonds of the first company to the extent of \$400,000, of which sum bonds were actually issued to the extent of \$381,000.

It appears that on March 31, 1891, the first company, by its deed of that date, conveyed to the second company all the property, real and personal, then owned by the former company, and, on the next day, the second company executed a deed of trust covering said property to the Central Trust Company of the city of New York. Said trust deed is for brevity called the "second company's mortgage." This mortgage was made to secure bonds of the second company to the extent of \$1,000,000, of which sum bonds were actually issued to the extent of \$480,000, the appellant being the holder of \$160,000 thereof.

It is alleged that, after the first company conveyed its assets to the second company, the latter acquired a large amount of corporate property, both real and personal, from its own earnings and from contributions by its stockholders, without any contribution or assistance from either

the first company or its mortgagee; that this additional property was in no way affected by, or subject to, the lien of the first company's mortgage, and was subject only to the lien of the second company's mortgage. Further allegations state that the second company, in accepting its deed from the first company, did undertake to pay when due the first company's bonds, but that the conveyance contained no language by which the second company pledged to the first company or its mortgagee any part of the second company's assets, or created any incumbrance in favor of the first company's mortgagee beyond what was already covered by that company's mortgage.

Afterwards the first company's mortgagee instituted suit in the circuit court of the United States for the district of Washington, by which it sought to foreclose its mortgage, and in that suit it made parties defendant, among others, both the first and second companies and the second company's mortgagee. Said defendants appeared in that suit by demurrer and objected to a decree therein so far as the personal property was concerned, because of the absence of the affidavit of good faith heretofore mentioned. Further objection was made to a decree in that action enforcing any lien against certain described real estate, on the ground that it was acquired by the second company after the transfer to it of the first company's assets. It is alleged, that the second company's mortgagee, trustee for the bonds held by appellant, as a defendant in the foreclosure suit, appeared by answer and denied the execution of the first company's mortgage and the priority of its lien; that the said several defenses should have been maintained and established by the defendant second company and its mortgagee for the benefit of the bonds, including appellant's; that the various demurrers and denials

were filed in said case in the month of March, 1895, and no active steps were thereafter taken until the entry of a final decree by consent on May 20, 1896, to which reference will be further hereinafter made.

It is further averred that about November, 1895, the second company conspired with the first and second companies' mortgagees and their various bondholders, excepting appellant, and, without the knowledge or consent of the latter, to deprive him of his rights and property in the bonds held by him. The plan of the alleged conspiracy, as set forth in the complaint, briefly stated, was as follows: Certain persons organized themselves as a committee called "the organization committee," and as such they effected the plan whereby the second company's mortgagee, the trustee for appellant's bonds, should relinquish its claim, as set up in its answer in the foreclosure suit, in favor of the holders of bonds of the first company, thus allowing the latter to take a decree and bid in the property for a nominal sum at mortgage sale, and in return therefor the second mortgage bondholders should participate in the reorganized company. But it is alleged that the appellant was to be excluded from participating in such reorganization, he being then absent from the United States.

The interposed defenses in the foreclosure suit were withdrawn, and decree of foreclosure thereupon entered on the date aforesaid. The plan of the reorganization required, that all holders of stocks and bonds of the second company should, within sixteen days, deposit with the first company's mortgagee all stocks and bonds held by them, together with a sum of money equal to ten per cent of the face value of all such bonds and floating debts, and two and one-half per cent of the par value of all such stocks;

that the payment of the money, however, might be made by installments, one-fourth at the time of the deposit of stocks and bonds, one-fourth on or before three months, and the balance on or before six months from said time; that, failing in that, such holders of stocks and bonds should forfeit and lose all rights therein and in the property covered thereby.

It is averred that appellant was not advised of this plan, and did not learn of it until about December, 1899; that he had previously, in May, 1895, signed a proposed plan by which he was to be admitted to an interest after foreclosure, but that such plan was abandoned during his absence from this country, and the other one substituted for it while he was in Central America. The plan of reorganization was carried out and appellant did not participate therein. He avers that, after returning to this country late in 1897, he first learned of the completed foreclosure, and says he was not aware of the abandonment of the first plan of reorganization in which he was to participate; that he immediately made inquiries, and was not at first informed that he was to be excluded; that in March, 1898, he began to investigate his real situation, but was not apprised of the second plan of reorganization; that it was not until December, 1899, that he got possession of the second reorganization agreement. At the time of the reorganization the property was conveyed to the third company, and, since then, by it to the present company.

Many other facts in detail are alleged in the complaint; but we believe the above statement, already extended, is sufficient save as further reference to the complaint and its exhibits may be hereinafter made. It concludes with a general prayer for an accounting by all the respondent companies, as to the original property, its increase, and

other accumulations of the companies, and also that the interests of appellant in the property owned by the second and third companies shall be determined and decreed to him. The respondents demurred to the complaint upon several grounds. The demurrers being sustained, the plaintiff declined to plead further, and the cause was dismissed. Plaintiff has appealed.

A number of questions are discussed by counsel, but for the determination of this case we find it unnecessary to pass upon any of them except that of the statute of limitations. That question was raised as one of the grounds of demurrer. Appellant seeks relief upon the ground of fraud. He says that he was fraudulently excluded from participating in the reorganization. The reorganization was effected in 1896, and all acts charged as fraud occurred either in that or the previous year. The suit was brought in January, 1901, more than four years after the acts charged as constituting the fraud were committed. Our statute provides that actions for relief upon the ground of fraud shall be brought within three years, but that the cause of action in such case shall not be deemed to have accrued "until the discovery by the aggrieved party of the facts constituting the fraud." Bal. Code, § 4800. Does the complaint show a discovery by appellant of the material facts constituting the alleged fraud at a time more than three years before this action was commenced?

It is true, as we have already seen, the statement is made in the complaint that appellant was not aware of the plan of reorganization until about December, 1899; and in another place it is stated that he did not get possession of the reorganization agreement until December, 1899. It is urged by appellant that said averments are sufficient to bring this case within the rule declared in *Stearns v.*

Hochbrunn, 24 Wash. 206, 64 Pac. 165. Such is, no doubt, true if other facts alleged are not inconsistent with these bare averments as to absence of discovery. In the case cited there was a direct and positive averment as to the time of discovery, and it does not appear that there were any other statements in the complaint inconsistent with such averments.

Appellant admits in his brief that he is not now entitled to share in the reorganization itself. Notwithstanding the averments of the complaint, the reorganization agreement, which is attached to the complaint as an exhibit, shows that appellant was not excluded from participating in the reorganization. All holders of the second company's stock and bonds were, by the terms of the agreement, placed upon equal footing. By its terms the appellant was privileged to deposit cash according to his holdings, ratably as other holders were permitted to do. Based upon appellant's holdings, it was necessary that he should deposit the aggregate sum of \$25,112.50, only one-fourth of which, as we have seen, was required to be deposited at the beginning, the remainder being payable by installments. Having failed to make such deposit, and not having tendered the same, he admits that he is not entitled to share in the reorganization. He nevertheless alleges the facts about reorganization, and discusses them as forming a basis for the relief which he asks. He reasons that his absence from the country was known, and that the terms of the reorganization were intentionally made such as it was known he could not meet within the time fixed. But the fact remains that the terms of the reorganization did not exclude him. It may have been his misfortune that he was absent from the country at the time. But respondents' counsel urge that some duty rested upon appellant to provide local represen-

tation to guard his interests in so important a matter while he sojourned in a country so remote as Central America. An exhibit attached to the complaint does show that he was represented by an attorney in fact in the signing of the first reorganization agreement, some six months prior to the last one, but it is not made to appear that such representative was acting for him at the date of the last agreement. It must, therefore, be assumed here that he was not locally represented, and that his absence was known to those participating in the reorganization, which facts, together with the effected reorganization, he urges amounted to a fraud upon his rights.

Notwithstanding what he urges as a fraud in the reorganization, he does not seek relief directly therefrom. He admits that he has not placed himself in position to ask participation in the reorganization, but he reasons that he is entitled to an accounting, and to a share in the value of the property which he claims was sacrificed at the mortgage sale, under the first company's foreclosure, as a part of the alleged fraudulent scheme. He urges that the defenses in the foreclosure suit set up by the second company's mortgagee, the trustee for appellant's bonds, were valid defenses, and that, if they had been pressed, they would have resulted in excluding a large amount of property from the lien of the first company's mortgage, to the benefit of the second company's bondholders, including himself. It will be remembered that those defenses were withdrawn by the second company's mortgagee, and the written stipulation for their withdrawal became a matter of record in the foreclosure case in May, 1896. A few days thereafter a decree of foreclosure *pro confesso* was entered, and this was soon followed by a foreclosure sale of all the property, including what appellant claims should

have been excluded from the first mortgage lien. He alleges that he had actual notice of all matters which were of public record. The above matters being all of public record as early as May, 1896, and soon thereafter, he, therefore, then had actual knowledge that the defenses had been abandoned by the second company's mortgagee, that the lien had been decreed against all the property, and that the same had been sold at judicial sale. A part of the property so sold was the same for which appellant by this action seeks an accounting, and in the value of which he seeks to share. The real fact which he alleges as constituting a fraud upon his rights in the property, for the value of which he seeks recovery, consisted of the abandonment of the defenses in the foreclosure suit. Under his theory, that act was a deliberate fraud upon his rights, since it left his property interests unprotected, and allowed them to be wrongfully subjected to the lien of the first company's mortgage. Appellant had actual knowledge thereof more than four years before he began his suit. For more than four years he had actual knowledge that the property, in the value of which he now seeks to share, had been judicially sold as subject to the lien of the first mortgage, and that the purchasers and subsequent holders held it by virtue of such lien and sale. The application of the doctrine of laches to the foregoing facts is much discussed by counsel, but we need not discuss that subject, since we find that the statute of limitations disposes of the case.

It is true, as we have already seen, appellant alleges that he did not discover the plan of reorganization until a later time, but, as hereinbefore stated, he does not, by this action, seek participation in the reorganization. He seeks an accounting, and, as a result thereof, to share in property, or its value, which he claims was fraudulently permitted to

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be judicially sold to the prejudice of his rights, and of which he had actual knowledge for more than four years before bringing his suit. Having knowledge that the property had thus passed into the hands of holders who depended upon the validity and priority of the lien, as decreed by the United States court, he cannot be permitted to disturb property rights and the relations of property holders after the period of limitation has run from the time these matters became of public record. It matters not that he may have hoped to be let into some reorganization scheme. He knew, nevertheless, that his alleged property interests had, in legal form at least, been swept away by the judicial sale, and that, if he would protect the same, the duty was upon him to do so within the period of the statute of limitations. His complaint, upon its face, shows that the facts constituting the real fraud, as alleged, were discovered at a time beyond the statutory period of limitations. Such being true, the complaint is not otherwise made good by the bare averment of a time of discovery. Under *Stearns v. Hochbrunn, supra*, the bare allegation as to time of discovery, standing alone, may be sufficient as against demurrer, but the bar of the statute cannot thereby be evaded when other facts are averred in detail, which are inconsistent therewith, and which disclose an actual discovery beyond the limitation period.

The judgment is affirmed.

MOUNT, C. J., and FULLERTON and DUNBAR, JJ., concur.

[No. 4787. Decided January 30, 1905.]

THE STATE OF WASHINGTON, *on the Relation of C. A. Cook, Appellant*, v. JOHN B. REED, *as Treasurer of Pierce County, Respondent*.¹

APPEAL AND ERROR—STATEMENT OF FACTS—NECESSITY—REVIEW OF FINDINGS—RECORDS—REDEMPTION FROM TAX SALES—INSPECTION. Upon application for a writ of mandate to compel the county treasurer to allow an inspection of certain records in his office, being copies of certificates of redemption from tax sales, a finding of the trial court that the same were not public records required by law to be kept, cannot be reversed on appeal where the evidence on which the finding was based is not brought up by a statement of facts.

RECORDS—COUNTY TREASURER—INSPECTION—KEPT AT PUBLIC EXPENSE. The fact that certain records of the county treasurer were kept at public expense does not establish that they are public records, open to inspection by the public.

SAME—DEMAND FOR INSPECTION—MANDAMUS. A general demand by a private citizen for an inspection of "any and all books of public records" desired by him, cannot be made the basis for a writ of mandate to the county treasurer, especially where the treasurer is willing to furnish specific information called for, free of charge.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 24, 1903, upon findings in favor of the defendant, after a hearing on the merits before the court, denying an application for a writ of mandate. Affirmed.

Jesse Thomas, for appellant, cited: *State ex rel. Colcott v. King*, 154 Ind. 621, 57 N. E. 535; *Burton v. Tuite*, 78 Mich. 363, 44 N. W. 282.

F. Campbell, *Charles O. Bates* and *Walter M. Harvey*, for respondent.

Reported in 79 Pac. 306.

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HADLEY, J.—This action was instituted for the purpose of procuring a writ of mandate against the county treasurer of Pierce county, to compel him to permit the relator, appellant here, to examine papers and records in the treasurer's office. The petition avers, that appellant went into the treasurer's office during the usual office hours and asked permission to examine certain certificates of redemption; that one of the clerks in the office handed him the first book of certificates of redemption, and he was preparing to examine the same for the purpose of procuring certain information, when he was informed by a deputy of the treasurer that he would not be permitted to examine the book; that afterwards such permission was also refused by the treasurer himself; that appellant thereupon demanded permission to examine any and all books of public records in said office which he might desire to examine at any reasonable time, but such permission was refused; that each of the books which appellant asked to inspect is filled out and kept at public expense, and contains information as to matters which directly affect title to real property in Pierce county, and that such information can be obtained from no other source. No alternative writ was issued, but the treasurer answered the petition.

The answer admits that the books of certificates of redemption mentioned are filled out and kept at public expense, but alleges that they are not public records, and are not records required by law to be kept by the treasurer, but that they are simply stubs or copies of certificates of redemption, issued by the treasurer to the parties redeeming real estate from tax sales, and that they are mere vouchers and private records of the treasurer. The cause was tried by the court. Findings of fact and conclusions of law were made, and judgment entered, denying the writ of mandate. This appeal is from the judgment.

There is no statement of facts here, and no exceptions to the findings of facts appear in the record. The case must, therefore, be determined upon the facts as found by the court. The court found that the books and certificates of redemption which appellant asked to examine are not public records, such as the treasurer is required by law to keep; but that they are copies, in the form of stubs, of certificates of redemption which have been issued by the treasurer to persons redeeming real estate from tax sales, and are mere memoranda of the facts and dates of such redemption. There appears to be no statute which requires the treasurer to keep any records in the nature of certificate of redemption stub books. The keeping of such books was, therefore, a matter of his own volition, and for his own convenience. The court heard the evidence as to the nature of these books, and that evidence is not before us. Therefore the finding as to their character cannot be disturbed. It is true, it was further found that the books were filled out at public expense, and from that fact it is argued by appellant that they became public records. But, even though made at public expense, it does not follow that the expenditure was a proper one, and authorized by law. They were not public records open to inspection by the public, as a matter of right, unless they were such as the law required to be kept.

The treasurer argues that the right of the ordinary citizen to inspect public records does not exist at common law, and that the only statutory provision in this state which authorizes an inspection of the county treasurer's records is found in § 432, Bal. Code. That section is as follows:

"The books, accounts and vouchers of the treasurer are at all times subject to the inspection and examination of the board of county commissioners and the grand jury."

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It is urged that, inasmuch as the foregoing statute authorizes an inspection of the county treasurer's records by the county commissioners and the grand jury only, it follows that no other persons may demand such an inspection as a matter of right. It is, however, unnecessary to pass upon that question in this case, since the particular demand for inspection involved here does not relate to a public record which the law requires the treasurer to keep.

The court further found that appellant also demanded permission to examine "any and all books of public records in said treasurer's office that he might desire to examine, or which relator's business, duty or interest might require." It neither appears in the petition, nor in the findings, what particular records appellant's "business, duty or interest might require." Such a general demand by a private citizen for the inspection of the records of a public office should not be made the basis of a writ of mandate against the officer. A demand for the examination of specific records, and that, too, at such times and in such manner as shall not interfere with the prompt and reasonable dispatch of public business, is alone sufficient to warrant the writ. In any event, however, the court found that the treasurer "will, when called upon, furnish to the relator, or to any other person having an interest therein, either as owner, agent, or otherwise, a statement showing the condition of the taxes levied and assessed against any specific tract or parcel of land, without cost or charge." Therefore, whatever may be appellant's right to the information furnished by records in the treasurer's office when properly specified, it nevertheless appears from the above finding that he has no cause for resorting to mandamus, since "as owner, agent, or otherwise," he can get the desired information when specifically asked.

The judgment is affirmed.

MOUNT, C. J., and FULLERTON, J., concur.

DUNBAR, J. (concurring)—I concur in the conclusion reached by the majority on account of the peculiar condition of the record, but do not wish to be understood as denying the right of a citizen, at proper times and in a proper manner, to inspect any public record by examining the record itself, notwithstanding the officer having such record in charge may proffer to furnish such person a statement of the condition of the record sought to be inspected.

[No. 5380. Decided January 30, 1905.]

MATTIE E. REDDING, *in her own right and as Guardian Ad Litem, etc., Appellant*, v. PUGET SOUND IRON & STEEL WORKS, *Respondent*.¹

TRIAL — PLEADINGS — COMPLAINT — INSUFFICIENCY NOT GROUND FOR JUDGMENT ON MERITS. A defect in the complaint in failing to state a cause of action does not justify a final judgment for defendant on the merits after plaintiff's opening statement to the jury, and the sufficiency of the complaint will not be considered upon appeal from such a judgment.

TRIAL—OPENING STATEMENT OF COUNSEL—WHEN GROUND FOR DISMISSAL. A judgment for defendant on the merits, based upon the plaintiff's opening statement to the jury, is justified only when facts are admitted from which it affirmatively appears that there is no cause of action or that there is a complete defense, and the omission to state a case fully is not ground for such a judgment.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered March 24, 1904, upon the pleadings and plaintiff's opening statement to the jury, dismiss-

¹Reported in 79 Pac 308.

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ing an action for damages for a death by wrongful act.
Reversed.

W. F. Hays and A. R. Titlow, for appellants.

Hudson & Holt, for respondent.

RUDKIN, J.—This was an action brought by the widow and minor children to recover damages for the death of the husband and father, caused by the wrongful act of the defendant. After the jury was impaneled to try the cause in the court below, the attorney representing the plaintiff made the opening statement of his case to the jury. Upon this statement the defendant moved the court to withdraw the case from the consideration of the jury, and to direct a judgment for the defendant. At the suggestion of the court, the motion was so amended as to include the pleadings, and, as thus amended, the motion was granted, the jury discharged, and a final judgment entered in favor of the defendant. The plaintiff appealed.

No reason is assigned in support of a judgment on the pleadings except that the complaint is defective and does not state facts sufficient to constitute a cause of action. The judgment rendered was a final judgment on the merits, and, if warranted at all, must find its support in the opening statement of counsel, and not in some defect in the complaint. The complaint alone, however deficient, would not justify or sustain a judgment on the merits such as was rendered by the court below. For this reason we will not consider or pass upon the sufficiency of the complaint, as the same may be amended after the case is remanded.

It is unnecessary to set forth the opening statement of counsel in full. We deem it sufficient to say that the statement was most general in its character, and fell far short of stating facts sufficient to warrant a recovery against the

respondent. Nothing was stated affirmatively, however, that would constitute a defense to the action or bar a recovery. When, then, is a court justified in taking a case from the jury and directing a judgment on the opening statement of counsel? That a party to an action is bound by admissions made by his attorney in the opening statement of his case, or at any stage of the trial, and that the court may act upon such admissions and direct a judgment in accordance therewith in a proper case is not disputed or denied. This is all that was decided in *Lindley v. Atchison etc. R. Co.*, 47 Kan. 432, 28 Pac. 201, and *Johnson v. Spokane*, 29 Wash. 730, 70 Pac. 122. In neither case was the opening statement upon which the trial court acted brought before the appellate court. *Oscanyan v. Arms Co.*, 103 U. S. 261, was an action on contract. It appeared from the opening statement of counsel that the contract in suit was against public policy and void, and the supreme court of the United States held that upon such a statement the circuit court properly directed a verdict for the defendant. So, in any case, if it affirmatively appears from the opening statement of counsel that the contract in suit is void, or if facts are admitted which constitute a full and complete defense to the action, it would be idle for the court to proceed further with the trial.

But such is not the case here. Counsel stated too little, not too much. The court directed a judgment, not because the appellant was admitted out of court, but because the opening statement did not state facts sufficient to constitute a cause of action. Counsel may state their case as briefly or as generally as they see fit, and it is only when such statement shows affirmatively that there is no cause of action, or that there is a full and complete defense thereto, or when it is expressly admitted that the facts stated are

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the only facts which the party expects or intends to prove, that the court is warranted in acting upon it. The opening statement now before the court contained no admissions which would constitute a defense or defeat the action, and the omission of counsel to state the case more fully is no justification for the action of the court below in withdrawing the case from the jury.

The judgment is therefore reversed, and the cause remanded for new trial.

MOUNT, C. J., and FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 5038. Decided January 30, 1905.]

R. M. MITCHELL, *Receiver, Appellant*, v. A. H. B. JORDAN, *Respondent*.¹

PLEADINGS—COMPLAINT—SUFFICIENCY—OBJECTION NOT MADE BELOW. Upon the review of an equitable case, where, after findings of fact are made, the lower court dismissed the action, the insufficiency of the complaint cannot be urged in support of the judgment for the first time in the supreme court, but its sufficiency will be tested by the facts shown in the record.

CORPORATIONS—CAPITAL A TRUST FUND FOR CREDITORS—RECEIVER TO ENFORCE. The capital stock of an insolvent corporation is impressed with a trust for the benefit of the creditors, and the receiver is the proper party to enforce the same.

SAME—DISTRIBUTION OF ASSETS AMONG STOCKHOLDERS IN FRAUD OF CREDITORS—STOCK HELD AS SECURITY. Where the stockholders of an insolvent corporation sold all the assets and divided the same among themselves by declaring a dividend, a party who held a majority of the stock as security for advances made by him to purchase a stock of goods for the company, and who received part of the assets in repayment of his advances with notice of the fraud upon creditors, is liable to the extent of the amount received, in an action brought by the receiver of the company in the interest of a creditor who had obtained a judgment against the company upon which execution was returned unsatisfied.

¹Reported in 79 Pac. 311.

SAME. The fact that such party agreed to surrender his stock to the other stockholders upon repayment of his advances, does not entitle him to claim that his position was not that of a stockholder, as between himself and creditors of the corporation.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered June 27, 1903, upon findings of the court, after a trial on the merits without a jury, dismissing an action to recover assets of an insolvent corporation, distributed in fraud of creditors. Reversed.

W. W. Black and Ralph C. Bell, for appellant.

Brownell & Coleman, for respondent.

FULLERTON, J.—The appellant is the receiver of the Riverside Hardware Company, and brings this action on behalf of its creditors. The facts on which he relies to recover are not in dispute, and are, in substance, these: In the early part of the year 1899, W. H. Stevens and George M. Pillsbury contracted with a Mrs. Fuller for the purchase of a stock of hardware, then in the city of Everett, at the agreed price of \$2,000. Not having the means to make the purchase themselves, they induced the respondent, A. H. B. Jordan, to advance the sum of \$1,800 towards the purchase price, and, when the transfer of the stock was made, took a bill of sale in his name, as if he were the sole purchaser. Mr. Stevens and Mr. Pillsbury thereupon incorporated the company of which the appellant is now receiver. In its articles of incorporation its capital stock was fixed at \$2,000, divided into 200 shares of \$10 each, and two trustees were provided for, Mr. Stevens and Mr. Pillsbury being designated as such to manage the concerns of the company for the first three months. Of the stock of the company, the respondent subscribed for and received 180 shares, Mr. Stevens 10 shares. and Mr. Pillsbury 10

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shares. The respondent paid for his shares by turning over to the corporation the stock of hardware he had received from Mrs. Fuller. How Mr. Stevens and Mr. Pillsbury paid for the shares received by them is not shown. At their first meeting the trustees adopted by-laws, in which it was provided that the officers of the corporation should consist of a president, a secretary, and a treasurer. To the office of president, they elected the respondent; to the office of secretary, Mr. Pillsbury; and to the office of treasurer, Mr. Stevens; each of whom was continued as such during the time the company existed as a going concern. Mr. Stevens appears, also, to have acquired the title of manager of the corporation, and to have acted as its manager in the conduct of its affairs during the same time.

While the respondent thus appeared upon the records of the concern as its president and principal stockholder, and as having an active interest in its welfare, it appears that, by a private written agreement entered into between himself and Messrs. Stevens and Pillsbury, he was, in reality, only their backer, having taken the bill of sale from Mrs. Fuller, and the stock issued to him, as security for the money he advanced towards the purchase of the hardware stock and business, with the understanding that he would assign the stock to them when the money advanced, with interest, was repaid him, whether by dividends declared thereon, or in any other manner. It was provided in the agreement, also, that, if the respondent should at any time deem his debt insecure, he might, in his capacity as principal stockholder of the corporation, remove Messrs. Stevens and Pillsbury as trustees, and substitute such other persons as he might choose in their stead; and, further, that no indebtedness on the part of the corporation should be created without his consent.

The corporation continued as a going concern until February 6, 1900, when it sold its entire business to one Westover for \$2,466.54. The trustees thereupon declared a dividend on the capital stock of this entire amount, and paid therefrom to the respondent the amount advanced by him, with interest at the agreed rate, and took an assignment to themselves of his stock, in equal proportions. The balance of the money received from the sale, together with some \$150 collected on outstanding accounts, they divided between themselves. At this time the corporation was indebted in some \$2,800, and was wholly insolvent. It, at the same time, ceased to do business as a going concern; and no attempt was made by the trustees, or by the respondent, to pay, or satisfy in any manner, the corporation's creditors. In the summer following this transfer, one of such creditors, who held a note of the corporation amounting to \$1,404.70, brought an action against it, and obtained judgment therein for the amount claimed. Execution was issued on the judgment, which was returned unsatisfied. The judgment creditor thereupon procured the appointment of the appellant as receiver of the corporation, and this action was instituted by him as above stated. The action was tried as an action of equitable cognizance before the judge of the court, who, after finding the foregoing facts, concluded, as a matter of law, that the respondent was not liable to refund any part of the money received by him on the so-called dividend above mentioned, and entered a judgment accordingly.

The respondent, among other reasons urged to sustain the judgment, contends that the complaint fails to state facts sufficient to constitute a cause of action, but inasmuch as he did not take this objection in the court below, this court will test the sufficiency of the complaint by the facts shown

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in the record, rather than by its technical averments. The principal question, therefore, is, do the facts found by the court warrant a recovery on the part of the appellant? We have no hesitancy in saying that they do. In this state the rule is firmly settled that the property of an insolvent corporation is a trust fund for the benefit of creditors, and that no one creditor can lawfully take the property of such a corporation to the exclusion of another. This being true, it would seem that, for much stronger reasons, one who was not a creditor could not lawfully take it to the exclusion of creditors. And, as the capital stock of a corporation is impressed primarily with a trust for the benefit of its creditors, it follows that, if such capital stock is divided among the stockholders, leaving its debts unpaid, any person receiving any part of such capital stock is liable to contribute to the payment of such debts a sum equal to the value of the property so received by him. As is said by Mr. Thompson:

"Accordingly, when the property has been divided among the stockholders, a judgment creditor, after the return of an execution against the corporation unsatisfied, may maintain a creditor's bill against a single stockholder, or against as many stockholders as he can find within the jurisdiction, to charge him, or them, to the extent of the assets thus diverted." 3 Thompson, Corporations, § 2963.

In this state the receiver of the corporation whose property has been so divided is the proper party to bring such an action for the benefit of the creditors. *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939; *Watterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041.

These considerations would seem to be conclusive of the appellant's right to recover; but it is said that, under the facts shown, the respondent was not a stockholder, because

of the agreement between himself and the promoters of the corporation above referred to. But we think this contention untenable. As between himself and such promoters, he was, doubtless, liable to surrender his interest in the corporation's stock held by him, on their payment to him of the value agreed upon; but, until that time came, he was, we think, a stockholder, as between themselves, and certainly he was such as between himself and a stranger dealing with the corporation without knowledge of this private agreement. If, however, this were not so, the respondent's liability to the creditors would not be affected. He was not, himself, a creditor of the corporation. He was a creditor, perhaps, of Stevens and Pillsbury, but that fact would not authorize him to take the property of the corporation in payment of their debt to him. Nor will it do to say that they, as trustees, divided the corporation's property among themselves, and then paid their debt to him out of their own property. Were the respondent an innocent purchaser of the corporation's property after it had been so divided, he might possibly claim non-liability for want of notice, but, unfortunately for his claim, the respondent had knowledge of the entire transaction. By the very terms of his agreement with the other stockholders, he could displace them as trustees whenever he saw fit, and no debt could be created without his consent. It would be the height of injustice and inequity to allow him, after consenting to an indebtedness for more than the property was worth, to take all of the property to the exclusion of such debts.

On the whole, therefore, we think the respondent should be held liable, up to the amount of money received by him from the sale of the property of the corporation, for all of its debts against which it can make no defense. The judg-

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ment of the lower court is reversed, and the cause remanded, with instruction to enter a judgment in accordance with this conclusion.

MOUNT, C. J., and HADLEY and DUNBAR, JJ., concur.

[No. 5403. Decided January 30, 1905.]

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THE STATE OF WASHINGTON, *on the Relation of Gordon Mackay, Appellant*, v. A. A. PHILLIPS, *as Treasurer of Thurston County, Respondent*.¹

COUNTIES—SALE OF COUNTY PROPERTY—NOTICE FIXING MINIMUM PRICE—POWER OF COMMISSIONERS. Under Laws 1903, p. 73, providing that the county commissioners may order property sold when they deem it for the best interests of the county, they have power to order a sale fixing a minimum price below which bids will not be received; and were it otherwise the restriction could not be treated as surplusage, and a sale for a less sum upheld, since the board did not exercise its discretion to order an unqualified sale.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered May 24, 1904, upon granting a motion for a nonsuit, denying an application for a writ of mandate to compel the county treasurer to issue a deed of county property. Affirmed.

Israel & Mackay, for appellant.

Frank C. Owings, for respondent.

RUDKIN, J.—Some time prior to the 13th day of April, 1903, the county of Thurston acquired title to lots 5 and 6, block 24, Sylvester's Plat in the city of Olympia, through the foreclosure of delinquency certificates and a tax sale. On the above date the board of county commis-

¹Reported in 79 Pac. 313.

sioners of said county made an order directing the county treasurer to sell the property above described at public auction, to the highest and best bidder for cash, at not less than the appraised value thereof, which was stated in the order of sale to be \$1,200 on lot 5, and \$1,275 on lot 6. On the 28th day of April, 1903, the county treasurer gave notice, as required by law, that he would sell the above described property at a time and place therein stated, to the highest and best bidder for cash, and that no bid would be received for less than the appraised value, which was set forth in the notice of sale. At a time to which the sale was regularly adjourned, the relator, Mackay, bid the sum of \$250 in cash for each lot above described, he being the highest and best bidder. The treasurer refused to receive the bid, or to execute a tax deed for the property, for the reason that the sum bid was less than the appraised value. The relator then applied to the superior court of the county for a writ of mandate, requiring the treasurer to receive the bid of \$500 on the two lots, and to execute a deed to the relator therefor. The writ was denied, and from the order denying the writ this appeal is taken.

The appellant contends that the board of county commissioners had no power to fix a minimum price below which the property should not be sold; that that part of the order of sale should be rejected as surplusage; and that it was the duty of the county treasurer, under the law, to sell the property to the highest and best bidder for cash, irrespective of the amount bid. We do not think that this contention can be sustained for two reasons.

Under the law of this state, Bal. Code, § 342, the board of county commissioners are intrusted with the care and management of the property and funds of the county. The act under which the order of sale in this case was made,

Laws 1903, p. 73, provides that a sale may be ordered "when in the judgment of the board of county commissioners they deem it for the best interest of the county to sell the same;" and that the treasurer shall give notice, stating the time and place and *terms* of sale. Under these statutes, we think that the board of county commissioners, in the interest of the public, have the power to fix a minimum price below which county property shall not be sold. Under any other view, the board, charged with the duty of managing, controlling, and selling county property, and conserving the public interest, would be compelled to stand idly by and see the property of the county sold at a sacrifice. We do not think that such was the intent of the law.

But were the law otherwise, it would not avail the appellant. If the board can only order the sale to the highest and best bidder, irrespective of the sum bid, they have never exercised the discretion vested in them, and the court cannot eliminate from the order, as made, important conditions and provisions, and construe it as an order which the board never intended to make. The board only made one order of sale, and, if that is not valid as made, it is not valid at all, and the courts cannot make an order for them.

For these reasons, the writ was properly denied.

MOUNT, C. J., and FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 5497. Decided January 31, 1905.]

D. HOLFORD, *Respondent*, v. RICHARD TREWELLA, *Garnishee and Appellant*, and S. S. KENNEDY, *Defendant*.¹

GARNISHMENT—PROCESS—SERVICE ON DEFENDANT BY PUBLICATION. A garnishee cannot object that judgment was rendered against the principal defendant, who was out of the state, upon a service by publication.

FRAUDULENT CONVEYANCES—SALES—STOCK OF GOODS IN BULK—PURCHASER TRUSTEE FOR CREDITORS—GARNISHMENT. One who buys a stock of merchandise in bulk, without complying with the statute requiring him to demand a list of the vendor's creditors and to see that the purchase price is applied to their payment, holds the property in trust for such creditors, and is liable to them in an action of garnishment (*Kohn v. Fishback*, ante p. 69, followed).

Appeal from a judgment of the superior court for King county, Morris, J., entered July 8, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Marshall K. Snell and *Bertha M. Snell*, for appellant.
Leopold M. Stern, for respondent.

RUDKIN, J.—The defendant, Kennedy, was engaged in the saloon and restaurant business in this state, between the 20th day of June and the 30th day of July, 1902. During that period the W. S. Grinsfelder Company sold to Kennedy, goods, wares, and merchandise of the value of \$116, to be used in the conduct of his business. On the 13th day of September, 1902, Kennedy sold his saloon and restaurant business, including all stock and fixtures,

¹Reported in 79 Pac. 308.

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Opinion Per RUDKIN, J.

to the garnishee defendant Trewella, for the sum of \$4,000 in cash. The purchaser did not demand or receive from Kennedy a verified statement containing the names and addresses of his creditors, or in any manner comply with what is commonly called "the sale in bulk act" of this state, Laws of 1901, p. 222. The claim of the Grinsfelder Company has not been paid, and no part of the purchase price of \$4,000 was applied in satisfaction of the Kennedy indebtedness. The Grinsfelder Company assigned its claim to the plaintiff, who brought an action thereon in the court below, and caused a writ of garnishment to be served on the garnishee defendant, Trewella. Immediately after the sale of his business, Kennedy left the state, and the summons in the main action was served by publication. The plaintiff recovered judgment against the defendant Kennedy for the sum of \$135, and the court rendered a judgment against the garnishee defendant for a like amount. The garnishee defendant appeals.

There is no merit in the objection that the judgment against Kennedy was rendered upon service of summons by publication, under the circumstances herein stated. The case of *Kohn v. Fishbach*, ante p. 69, 78 Pac. 199, is decisive of the other questions presented on this appeal.

For this reason we will not pass upon the motion to dismiss the appeal on the ground that the amount in controversy is not sufficient to confer appellate jurisdiction on this court.

The judgment is affirmed.

MOUNT, C. J., and FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 5330. Decided January 31, 1905.]

THE PENNSYLVANIA COMPANY, *Appellant*, v. THE CITY
OF TACOMA *et al.*, *Respondents*.¹

TAXATION—PRIORITY OF GENERAL TAXES OVER LOCAL ASSESSMENT LIENS—INSTALLMENTS UNMATURED. The general lien for taxes is paramount, and a foreclosure thereof cuts off liens for local assessments, regardless of the fact that the local assessments are due in installments, some of which are not matured at the date of the foreclosure of the general tax.

SAME — PARTIES — PROCEEDING IN REM — MUNICIPALITY BOUND. The foreclosure of a lien for general taxes is a proceeding *in rem* and subsequent liens for local assessments by a city are cut off, although the city was not made a party.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered August 29, 1904, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to quiet title. Reversed.

Fogg & Fogg, for appellant.

O. G. Ellis and *J. J. Anderson*, for respondents, cited: *Markley v. Whitmore*, 61 Ohio St. 587, 56 N. E. 461; 2 Smith, Mun. Corp. § 1273; *McCollum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 725.

RUDKIN, J.—This is an action to quiet title. The following is a brief statement of the facts. The lots in controversy are situated within the corporate limits of the city of Tacoma. Taxes were levied against them for state and county purposes for the year 1895 and prior years. In 1900 a certificate of delinquency for the taxes of 1895 and prior years was issued to Pierce county by its county treasurer. In 1901 and 1902, this certificate of delinquency was foreclosed, the lots sold, and a deed therefor

¹Reported in 79 Pac. 306.

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executed to the county. The county thereafter conveyed the lots to the plaintiff in this action. On the 25th day of July, 1899, the city of Tacoma, by ordinance, levied an assessment on these lots, and other property, for a local improvement. The assessment was made payable in installments on the 20th day of November, in the years 1900, 1901, 1902, 1903, and 1904, respectively. Under the terms of the ordinance, the assessment thus levied was declared to be a lien on the property within the assessment district from the date of the ordinance until the assessment was paid. No question is raised as to the regularity of any of these proceedings, except that the city of Tacoma was not made a party to the proceeding to foreclose the delinquency certificate. The court below decided that the tax foreclosure cut off the lien of the local improvement assessment, in so far as the installments had matured at the time of the foreclosure, but that such lien was not affected by the foreclosure, in so far as the installments had not then matured. The correctness of this ruling is the only question presented on this appeal.

We have so often decided that the lien for general taxes is paramount to all other claims and liens, including the lien of assessments for local improvements, that the question is no longer an open one in this court. *McMillan v. Tacoma*, 26 Wash. 358, 76 Pac. 68; *Keene v. Seattle*, 31 Wash. 202, 71 Pac. 769; *State ex rel. Craver v. McConaughy*, 31 Wash. 207, 71 Pac. 770; *Ballard v. Way*, 34 Wash. 116, 74 Pac. 1067. The fact that the local improvement assessment is payable in installments, and that some or all of the installments have not matured, can make no possible difference. The local improvement assessment, due or not due, is a charge against the property which will not be permitted to impede or interfere

with the collection of state and county taxes. This rule may operate harshly against the municipalities of the state where assessments for local improvements are made payable in installments through a long series of years, but, if so, the remedy lies with the legislature and not with this court.

The fact that the city of Tacoma was not made a party to the proceeding to foreclose the delinquency certificate does not change the rule. The law only requires that notice of the application for a tax judgment shall be served on the owner of the property, if known. If this requirement is complied with, the proceedings are *in rem*, and the judgment binds all the world. Lien claimants and others may preserve their rights by paying the taxes at any time before sale, but not otherwise.

The judgment of the court below is reversed, and the cause is remanded, with directions to enter a judgment in accordance with the prayer of the complaint.

MOUNT, C. J., and FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 4850. Decided January 31, 1905.]

WILLIAM WOODS, *Respondent*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Appellant*.¹

MASTER AND SERVANT—RAILROADS—NEGLIGENCE—INJURY TO BRAKEMAN THROUGH FALL FROM CAR—UNUSUAL CONSTRUCTION OF FOREIGN CAR—ASSUMPTION OF RISK—NONSUIT—EVIDENCE—SUFFICIENCY. In an action against a railroad company for personal injuries sustained by a brakeman in falling from a foreign car received for transportation, through the fact, as claimed, that the hand-grab on top of the car was within three inches from the end of the car instead of further back, as usual, and that the de-

¹Reported in 79 Pac. 309.

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Opinion Per HADLEY, J.

fendant negligently failed to notify the plaintiff of such fact, it is error to refuse a nonsuit where it appears that the plaintiff was an experienced brakeman, and had seen and knew of the receipt of cars somewhat similarly constructed, and where the position of the hand-grab was apparent as soon as he reached the top of the car, and he did not fall at that time, but in attempting to rise, the hand-grab being of no assistance in rising, and there being nothing out of repair about the car; since he assumed the risk upon seeing the situation, which was equivalent to notice, and the company's duty to inspect foreign cars for defects, or unusual construction which is not open and apparent, does not establish any negligence under the circumstances.

Appeal from a judgment of the superior court for King county, Griffin, J., entered June 16, 1903, upon the verdict of a jury rendered in favor of the plaintiff in an action for damages sustained by a brakeman in falling from a car. Reversed.

James F. McElroy and *B. S. Grosscup*, for appellant.
Benson & Hall, for respondent.

HADLEY, J.—This action was brought to recover damages for injuries received by respondent while working as a brakeman in the railroad yards of appellant, at Seattle. Respondent had just climbed to the top of the rear car in a moving section of nineteen freight cars. As he was in the act of rising, after reaching the top of the car, the speed of the engine was suddenly checked, and the consequent jerk caused him to lose his balance and fall. He fell off the car, and received severe injuries about the foot. The car from which he fell was a circus car which had been received by appellant from another line of road.

The complaint charges, that all reasonably safe freight cars, and all freight cars in general use in the state of Washington, and throughout the United States, are provided with hand-grabs on the tops of the cars, which are,

in nearly all cases, fastened at least twelve inches from the ends of the cars, and generally fifteen or more inches therefrom; that, upon the car from which respondent was thrown, the hand-grab was negligently and dangerously placed within three inches of the end of the car; that appellant had possession of the car two days immediately preceding the time respondent was injured, and that it knew, or by the exercise of reasonable care could have known, that said hand-grab was dangerously near the end of the car, but that appellant neglected to notify respondent thereof; and that he was not aware of the same until the time he was injured.

The answer avers, that respondent was familiar with the nature of his duties as switchman and brakeman, and was familiar with appellant's business of receiving into its yards, at Seattle, cars of other roads of various styles of construction; that the style of construction of the circus car mentioned was as open and apparent to respondent as to any of the officers or agents of appellant, and that the car was in good order and condition. The cause was tried before the court and a jury, and a verdict was returned in favor of respondent. Judgment was thereupon entered for respondent, and this appeal is from the judgment.

It is assigned that the court erred in refusing to grant appellant's motion for nonsuit at the close of respondent's case, and, also, in refusing, at the close of all the testimony, to withdraw the case from the jury and enter judgment for appellant. It is the contention of appellant that the evidence showed no negligence upon its part. It is appellant's duty to receive and transfer cars from other lines of railroad. This duty is enjoined by statute, and is in pursuance of the constitution of this state. See

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§ 13, art. 12, Const. of Washington, and §§ 4318 and 4319, Bal. Code. Respondent admits that such is appellant's duty, and that it is, also, required to receive cars of different construction from that of its own; but that the duty rests upon appellant to inspect all cars received, and to warn its employees against dangers from any unusual construction. There is no contention that the car in question was in any way out of repair. Negligence is predicated entirely upon the manner of construction, in the placing of the grab-bar, and upon appellant's omission to notify respondent thereof.

The ladder upon this car was at the end, whereas the ladder upon the ordinary Northern Pacific car is at the side. The grab-bar upon Northern Pacific cars is usually located fifteen inches or more from the end of the car, while upon this car it was about three inches. The evidence shows that certain other cars are, in the particulars mentioned, constructed similarly to this circus car; such is true of refrigerator and fruit cars, and, also, of Armour & Co. cars. Respondent says he has not observed all of these, but he has seen the refrigerator cars. He thinks, however, that the hand-grab upon those he has seen was usually located from six to eight inches from the end of the car. He has had a number of years' experience as a brakeman, and his testimony shows that, during that experience, he has observed that cars of construction similar to this one are received and transferred from other lines. The peculiar danger which he urges from the situation of the hand-grab in this instance is that it was so near the end that it did not enable him to reach forward and pull himself upon the car, as if it had been located further from the end. He says, if it had been located further from the end, he would have been forward

upon the car when rising, and that, when he lost his balance, he would have fallen upon the car, and not upon the ground. His testimony shows, however, that the situation was open and apparent to him when he reached the top of the ladder. He saw the location of the grab-iron and took hold of it, but at the same time took hold of the running board to help himself forward. He admits that the grab-iron was of no assistance to him in rising, and would not have been if located further forward, its only use being to assist in pulling himself upon the car. It was after he was upon the car, and while undertaking to rise, that the accident happened.

When respondent saw the situation, as he ascended the ladder, he then assumed the risk, as one of the incidents to his employment. If the grab-bar had been out of repair, and its condition not apparent, and if he had been injured by reason thereof, the case would have been different. The duty rested upon appellant to inspect foreign cars to see that no hidden dangers, such as want of repairs, involved its employees; and, if the original construction were such as confronted the employee with unusual and probably dangerous conditions, which were not apparent to him, doubtless the same duty would rest upon appellant to inspect even foreign cars as to such unusual construction, and to warn employees thereof. We are unable to see that any negligence of appellant appears from the evidence. The car was received in the course of appellant's duty as a common carrier. As such it, from time to time, received cars of different construction, and respondent knew that such was the fact, particularly in relation to the location of the hand-grab. When he saw the situation, he was as fully informed thereof as if he had been previously notified by appellant. With such

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full knowledge, in either case, he must have assumed the risk attendant upon that particular construction.

In *Michigan Central R. Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791, the same principle was involved. At the ends of the cars were what are known among railroad men as "deadwoods." The defendant's cars in that case were supplied with what are called "single deadwoods," while the foreign car had "double deadwoods." The plaintiff in the case was injured while attempting to couple the foreign car to one of his own road. He urged that the use of the double deadwoods was unusual and dangerous, and that his employer was negligent in permitting their use upon the foreign car without notifying its employees thereof. Judge Cooley, who wrote the opinion, said:

"But we have had produced for our inspection on the argument a model of the double dead-woods which caused the injury, and it seems impossible to give to the coupler any better or more effectual notification of their presence, and of the difference from those belonging to the defendants than their very form necessarily gives of itself. The difference is very marked and striking, and it is quite impossible to couple the double dead-woods, or to approach them for the purpose with any degree of attention without observing it. This is so whether the coupling is done in the day-time or night-time; for in the night every switchman has his lantern with him, or should have it on all occasions. If therefore a switchman were to declare that he had attempted to couple the double dead-woods without noticing how they differed from the cars of defendant, the conclusion would be inevitable that he had gone heedlessly in the performance of a duty requiring great care, and that he had not allowed his eyes to inform him what was before him. Moreover the business of the road was of itself a notification that many differences requiring attention in coupling were to be encountered by switchmen and brakemen. The Michigan Central is a

great common way for the cars of all the railroad companies of the country, and every man in employ of the defendant, if he has ordinary intelligence, is perfectly cognizant of the fact. He knows, too, that the cars of the several railroad and transportation companies differ, and that at one time or another all these differences may appear in the cars he may be called upon to couple or uncouple. Every train is likely to have several kinds, and he cannot assume as he passes from one to another that the two will be alike; much less that the whole train will be. To notify him specially of the differences would not only be troublesome and expensive, and oftentimes, as above explained, confusing, but it would be a work of supererogation; for any man capable intelligently of performing the duty would be no wiser after the duty than before; and a man who would not heed the information the very nature and course of the business would impart to him, would be protected by no notice. The best notice is that which a man must of necessity see and which cannot confuse or mislead him; he needs no printed placard to announce a precipice when he stands before it."

The above remarks seem to be peculiarly applicable to the conditions in the case at bar. As Judge Cooley reasoned in that case, so in this one, the very sight of the grab-bar itself, lying immediately before respondent as he started to climb upon the top of the car, was the most effectual notification which he could have received of its location, and of the situation which he was required to meet. See, also, *Thomas v. Missouri Pac. R. Co.*, 109 Mo. 187, 18 S. W. 980; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298; *Pierce v. Bane*, 80 Fed. 988; *Baldwin v. The C. etc. R. Co.*, 50 Iowa 680.

The cases cited by respondent involved out-of-repair conditions of the foreign car, as well as matters of original construction, and, as we have already intimated, it is the duty of the receiving company to inspect and guard

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Statement of Case.

against defects of the foreign car from lack of repairs, and which may not be open and apparent to the employee. No out-of-repair conditions being present in the case at bar, the said authorities do not seem to reach the point now before us.

For the foregoing reasons, we think, no negligence of appellant appears, and we believe the court erred in not withdrawing the case from the jury, and in not granting judgment for appellant. The judgment is reversed, and the cause remanded with instructions to enter judgment for appellant, dismissing the action.

MOUNT, C. J., and FULLERTON, and DUNBAR, JJ., concur.

[No. 5441. Decided February 1, 1905.]

CATHERINE CULLEN, *Respondent*, v. GEORGE BOWEN,
Appellant.¹

FIRES—NEGLIGENCE—DEFENSES—TITLE TO PROPERTY DESTROYED—POSSESSION SUFFICIENT WITHOUT TITLE. In an action for the value of buildings, crops, and personal property destroyed by a fire negligently set out by an adjoining land owner, the defendant can not assert want of title in the plaintiff, who was in the adverse possession of the land when the crops were raised, and of the personal property, claiming the same under a will from her deceased husband, whether the will was valid or not.

SAME—EVIDENCE OF POSSESSION—VOID WILL. In such a case a will bequeathing all the community property to the plaintiff, even if void as to other heirs, is competent to show the nature of the plaintiff's possession, where it had not been questioned for over four years by any of the parties interested.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered April 19, 1904, upon findings in favor of the plaintiff, after a trial on the merits be-

¹Reported in 79 Pac. 305.

fore the court, a jury being waived, in an action to recover for property destroyed by a fire negligently set out by defendant. Affirmed.

Forney & Ponder, for appellant.

W. W. Langhorne, for respondent.

RUDKIN, J.—This was an action to recover damages for the destruction of property by fire. The complaint charges that the defendant negligently set out and kindled a fire on his own lands, and negligently suffered the fire to spread to the lands of plaintiff, whereby her property was consumed and destroyed. The property destroyed consisted of a barn and outbuildings, together with the hay, grain, and farm implements therein contained. The case was tried by the court without a jury, findings were made in favor of the plaintiff, and, from the judgment entered in accordance therewith, this appeal is taken.

Two questions are presented in the briefs of counsel: (1) Was the respondent the owner of the property destroyed? and (2) does the evidence establish negligence on the part of the appellant? The facts in connection with the respondent's title are these: The lands on which the buildings were situated, and upon which the hay and grain were grown, and at least a part of the other personal property destroyed, were owned by the respondent and Thomas Cullen, her deceased husband, on and prior to the 19th day of January, 1900, and were community property. Said Thomas Cullen died testate on the above date, devising and bequeathing all of his property, real and personal, to the respondent. The six children of the deceased were not named or provided for in the will, and the will was

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not proved or admitted to probate until after the commencement of this action. The appellant objected to the introduction of the will and probate proceedings in evidence, first, because the will was not admitted to probate until after the commencement of the action, and second, because the will was void as to the children of the deceased. If this were an action to try title, and the will the foundation of the respondent's title, the objection, perhaps, would be well taken; but such is not the case here. We think the will was competent evidence for the purpose of showing the nature of the respondent's possession, and her claim to the property destroyed. The husband had been dead for nearly four years, the children have never questioned their mother's title to this property, though nearly all of them have long since attained the age of majority, and we have no assurance that they ever will. Why, then, should a stranger and a trespasser be permitted to question it now? *Northern Pac. R. Co. v. Lewis*, 51 Fed. 658, 2 C. C. A. 446; *Gulf Etc. R. Co. v. Johnson*, 54 Fed. 474, 4 C. C. A. 447; Cooley, Torts, 444; Tiedeman, Real Property, § 692; Sutherland, Damages, § 1009; *Haws v. Victoria Copper Min. Co.*, 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436. In the last case, the court says:

"The elementary rule is that one must recover on the strength of his own and not on the weakness of the title of his adversary; but this principle is subject to the qualification that possession alone is adequate as against a mere intruder or trespasser without even color of title, and especially so against one who has taken possession by force and violence. This exception is based upon the most obvious conception of justice and good conscience. It proceeds upon the theory that a mere intruder and trespasser cannot make his wrongdoing successful by asserting

a flaw in the title of the one against whom the wrong has been by him committed."

The court cites this language from the opinion in *Christy v. Scott*, 14 How. 282:

"A mere intruder cannot enter on a person actually seized, and eject him and then question the title or set up an outstanding title in another."

In *Gulf Etc. R. Co. v. Johnson*, *supra*, the court says:

"As against a wrongdoer, possession is title. The presumption of the law is that the person who has the possession has the property, and the law will not permit that presumption to be rebutted by evidence that the property was in a third person, when offered as a defense by one who claims no title, and was a wrongdoer. One who goes through the country negligently or wilfully setting fire to people's pastures, hay stacks, and houses, will not, when called upon to pay for his wrongful act, be heard to say that the legal title to the prroperty destroyed was in the third person and not in the person who had the actual possession."

The respondent was unquestionably the owner of the crops grown on the land while held adversely by her, and the value of these, together with her interest in the other property destroyed, would exceed the amount of the judgment, under the undisputed facts in the case, if the respondent is entitled to recover at all. The question of the negligence of the appellant is one of fact which involves the application of no principle of law. A careful examination of the record fails to disclose any reason why this court should interfere with the findings of the court below. There is no error in the record, and the judgment is affirmed.

MOUNT, C. J., and FULLEERTON, HADLEY, and DUNBAR, JJ., concur.

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Opinion Per HADLEY, J.

[No. 4747. Decided February 2, 1905.]

McNAUGHT-COLLINS IMPROVEMENT COMPANY, *Appellant*,
v. ATLANTIC & PACIFIC PILE & TIMBER PRE-
SERVING COMPANY, *et al.*, *Respondents*.¹

TIDE LANDS—PREFERENCE RIGHT TO LEASE—STATE LAND COMMISSIONERS—ORDER OF SALE—APPEAL—TIME FOR AND BY WHOM TAKEN. Where the owner of tide lands loses his preference right to lease abutting harbor area by failing to apply in time, he can not appeal from the state land commissioners' order of sale of such right to a third party, when he was a stranger to the proceedings; and such an appeal could not be taken more than thirty days after the order of sale.

SAME—ORDER CONFIRMING SALE—RE-SALE—GROUNDS FOR—DISCRETION OF BOARD. The board of state land commissioners acts in an executive and discretionary manner in confirming a sale of the right to lease harbor area, and the denial of a re-sale is not appealable where the affidavit therefor does not charge that the interests of the state are injuriously affected by fraud or collusion.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 25, 1903, dismissing an appeal from an order of the state board of land commissioners, confirming a sale. Affirmed.

Ballinger, Ronald & Battle, for appellant.

Mackinnon & Foley, Embree & Cole, and *George B. Cole*, for respondents.

HADLEY, J.—This is an appeal from a judgment of the superior court, dismissing an appeal from the board of state land commissioners. The statute of 1901 provided that any owner, under deed or contract, of tide or shore land abutting on harbor area, should have, until the 1st day of July, 1902, a preference right to apply for, obtain, and receive a lease of the right to build and maintain

¹Reported in 79 Pac. 484.

wharves, docks, or other structures, upon that portion of the harbor area lying in front of said tide lands. Laws 1901, ch. 138, p. 294. No application for lease of the harbor area was filed by appellant prior to said July 1, 1902; but on July 21st certain exhibits, mentioned by appellant as "part of the application for harbor area lease in front of block 404, Seattle tide lands," were forwarded to the state land commissioner's office.

Meantime, on July 5th, the respondent Mackinnon filed an application to lease said area, and on July 15th the board of state land commissioners made an order directing public sale of the right to lease the same, said sale to take place August 30th. Notice of the sale was duly posted and published, and on said date the right to lease was, at public auction, sold to respondent Mackinnon. The sale was approved by the board of land commissioners October 20th. On September 26th the appellant made application for a re-sale of the right to lease said harbor area, and offered to pay in excess of twenty-five per cent more than the price at which the same was sold to respondent Mackinnon. Said application was denied October 30th. On November 29th appellant appealed to the superior court. The notice of appeal specifies, as that from which the appeal was taken, the following: (1) Order directing public lease or sale; (2) order confirming public sale; (3) order denying petition of appellant for a re-sale.

It will be seen, from the foregoing statement, that appellant lost its preference right, if it ever had such right, by not filing an application to purchase within the time limited by law. After the expiration of that time, the respondent Mackinnon applied for the sale of the right to lease, and the same was regularly sold to him,

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at public auction, after due notice. It seems manifest that appellant had no standing to appeal from the order directing the sale of the right to lease. It was at that time an entire stranger to the record before the board of land commissioners, either as an applicant to purchase or otherwise. Its property rights or interests were not affected so as to give it the right of appeal under the terms of § 1, ch. 62, Laws 1901, p. 98, for the reason that it had lost the preference right to purchase. Moreover, more than thirty days had elapsed from the time the order directing sale was made before the appeal was taken. The time to appeal had therefore expired under § 2 of the above mentioned chapter, even if the right had ever existed.

The attempted appeal from the order confirming the sale was also too late. The sale was confirmed October 20th, and the appeal notice was filed November 29th. An additional question may be said to be involved in the attempted appeal from the order of confirmation, for the reason that, before that order was made, appellant had applied for a re-sale, and had offered a sum in excess of the selling price, as above stated. The discussion of this subject is, however, involved with another branch of the attempted appeal which we shall hereinafter discuss.

The attempt was, also, made to appeal from the order denying appellant's petition for a re-sale of the right to lease. In *State ex rel. White v. Board of State Land Commissioners*, 23 Wash. 700, 63 Pac. 532, it was held that, in leasing harbor areas, the commissioners exercise executive or administrative functions only; and in *State ex rel. Bussell v. Bridges*, 30 Wash. 268, 70 Pac. 506, it was held that the statute, § 15, p. 240, Laws 1897, with reference to re-advertising and re-sale, vests in the board

the discretion to order a re-sale. The statute seems to contemplate that a re-sale shall be made, if, by affidavit, it is shown that the interests of the state in the sale have been injuriously affected by fraud or collusion, or that the sale may not have been fairly conducted. No such affidavit was filed here. The application for re-sale makes no such charges, and is not even verified. Under such circumstances, the matter of re-sale was executive and discretionary, and the refusal of the board to re-sell is not appealable.

The superior court did not err in dismissing the appeal, and the judgment is affirmed.

MOUNT, C. J., and FULLERTON and DUNBAR, JJ., concur.

[No. 4575. Decided Feb. 4, 1905.]

BESSIE WALKER, as *Administratrix, etc.*, v. ELLEN A.
HARGEAR *et al.*, *Respondents*.¹

GIFTS—EVIDENCE OF INTENTION—SUFFICIENCY—FINDINGS WHEN SUSTAINED. Findings of the trial court that the transfer of certain bonds and securities from the decedent to his niece was intended as a gift, are sustained by the evidence where it appears that he earned large sums of money, and gave liberally to all his relatives, that he had conceived a great attachment for his niece, to whom he gave preference in every way, and that he constantly wrote speaking of the securities as her own, and never required any accounting, either of the principal or of the proceeds.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered July 1, 1902, upon findings in favor of the defendants, dismissing on the merits an action for an accounting, after a trial before the court without a jury. Affirmed.

¹Reported in 79 Pac. 472.

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A. R. Titlow and John A. Shackelford, for appellant.

J. M. Ashton and W. L. Sachse, for respondents.

FULLERTON, J.—The appellant, as administratrix with the will annexed of the estate of Allan James Foley, deceased, brought this action against the respondents to recover certain property which she alleges was entrusted to the respondent Lillian F. Hargear, by Allan James Foley, to hold as trustee and agent for him, which property was in part in her possession and under her control, and in part in the possession and under the control of the other respondents. The property was alleged to consist of a library of great value, including a musical library; of furniture, silverware, curios, and other personal property of like kind; of bonds of the state of Virginia of the face value of \$55,000, and other bonds; of state, school, and county warrants, stocks in mining corporations and other securities; and of money on deposit in banks, and in the possession of the respondents. It was further alleged that the appellant was unable to give a more accurate description of the property, or accurately state its value, because of the refusal of the respondents to give any information concerning the same, but that the appellant believed such property to be of the value of more than fifty thousand dollars. The appellant prayed that the respondents be compelled to account for such property, and, on said accounting, to deliver the same to the appellant, as administratrix, that it might be administered upon according to law.

The respondents Lillian F. Hargear and Bessie L. Hargear answered jointly, denying that they had property of any kind belonging to the estate of Allan James Foley, deceased, and averring that any property they then had which

may have formerly belonged to him was given them by him in his lifetime, in consideration of the mutual love and affection existing between them and him, as their sole and separate property, and was by them, at the time of said gifts, accepted and taken as their sole property. The respondent Ellen A. Hargear answered separately; her answer was, however, of the same tenor and effect as the answer of the other respondents. The affirmative matter of the answers was put in issue by appropriate replies.

On the trial it developed that Mr. Foley had, at sundry times, commencing in 1894, and continuing up to the time of his death in the latter part of the year 1899, placed in the possession of Lillian F. Hargear various sums of money, aggregating several thousand dollars, and had delivered to her bonds of the state of Virginia of the face value of \$50,000, and had, during the same time, presented each of the respondents with various articles of wearing apparel, with jewelry of considerable value, and had furnished the house in which they resided with rare pieces of furniture and bric-a-brac of various kinds, gathered on his tours in this and in foreign countries. This house, also, was constructed with money furnished by the deceased. In one of his earliest visits to the respondents, he arranged for its construction, and, later on, sent Lillian F. Hargear the money necessary for that purpose, as well as the money to buy the lots upon which it was erected. Later he sent her money for the purchase of a cottage at Delano Beach. The title to each of these properties was taken, by his special direction, in the name of Lillian F. Hargear.

The respondent Ellen A. Hargear is a sister of the decedent, and Lillian F. Hargear and Bessie A. Hargear are his nieces, and are daughters of Ellen A. Hargear. The appellant is, also, a sister of the deceased. The decedent

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had a brother, one W. R. Foley, who was the father of a considerable family. To all of his relatives, the decedent was exceedingly liberal. The record shows that appellant herself had received at one time some \$2,400 for the purpose of building a house for herself and family, and that one member, at least, of the brother's family had been educated in Europe at the decedent's expense, and that the brother himself was in constant receipt of gifts of property and money from the decedent, and that all of them had received personal gifts of jewelry and wearing apparel, much of the character of that received by the respondents.

On the trial the appellant abandoned any claim to the dwelling house and the cottage at Delano Beach, and also to the household furniture, curios, and other bric-a-brac, and the various articles of jewelry and wearing apparel, mentioned in the complaint as having been received by the respondents, but contended that Lillian F. Hargear was liable to account for the moneys received and invested in state and county securities, and for the bonds of the state of Virginia. The trial court, however, held that she had received these as gifts from Allan James Foley, and entered judgment to the effect that the appellant take nothing by her action, and that the respondents recover their costs.

That Mr. Foley intended the Virginia bonds, and the various sums of money he sent Lillian F. Hargear, as gifts to her, it seems to us, the record hardly leaves a doubt. Mr. Foley was a noted musician, capable of earning large sums of money in the practice of his art. During the season of the year when his services were in demand, he made his headquarters at London, England; the balance of the year he spent in recreation and pleasure. While previous to 1894 he wrote occasionally to his sister Ellen A. Hargear, he paid his first visit to her family home in that year. At

this visit he conceived a great affection for his niece Lillian F. Hargear, returning to visit at her mother's home each recurring year from that time up to his death, except the year 1898, when he had her come to his London residence and spend the summer travelling with him in England and on the continent of Europe. When separated from her, he wrote to her constantly—the greater part of the time, as often as twice in each week. And the last letter that he ever penned, which was but a few hours preceding his death, was a letter to her. His letters, also, many of which are in the record, betray towards her the warmest affection. In the practice of his art he travelled over England, Ireland, and the continent of Europe, in Canada, and parts of the United States, and his letters were written from many places, and under various conditions, but whether they were merely rambling accounts of his personal doings, of people he met with, of places he visited, or pertaining to matters of a business nature, they all show that, no matter how uncomfortable or exacting was his situation, or how arduous were his labors, his thoughts were centered upon her, and that her welfare and happiness was his chief consideration.

Toward his other relatives, while he seems to have entertained for them the regard men usually bear towards their worthy kindred, he never expressed, and seems not to have had, any particular affection. He assisted them when they were in need, and when requested so to do, but did not regard them as particular objects of his care.

In the light of these circumstances, there was nothing strange in the fact that he made this niece the recipient of his special bounty. On her he had showered all of his affections, and it was but natural that he should shower upon her that part of his property of which he had no

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special need. On the other hand, it would seem strange that he would select her as the keeper of his property or as his agent to make investments for him. While the record shows her to be a woman of good intelligence, and possessed of ordinary business qualifications, yet she was not engaged in the business of keeping property or making investments for others. She was a teacher in the public schools, and her opportunities for safely keeping property, or investing it, were not equal to the many who were engaged directly in that business. But that safe keeping or investment was not his object, is further evidenced, it seems to us, by the fact that no accounting was ever demanded. Miss Hargear received at least a part of the money now thought to belong to the estate of Mr. Foley as early as 1894, yet there is not the slightest evidence in the record that he ever called her to account for it, or that he ever inquired how much it had earned. Indeed, so far from making any such demand, it is shown by one of his letters that, on one of his visits, he borrowed \$150 from her on leaving, which he repaid by his earnings from a chance concert he gave while on his way from Tacoma to London. These letters also contain much else tending to show that the money and bonds were gifts. In no letter does he claim an interest in either, and, whenever he mentions either money or bonds, he always refers to it or them as her property. For example, as late as October, 1897, he wrote her, evidently in answer to her letter concerning the state of her health, using this language: "You have a thousand dollars a year coming in from those Virginians, so you need not feel hard up, and I insist on you resting yourself when you don't feel perfectly well. Health above all things, darling; and school work is so fagging . . . ;" and, in September preceding this, he wrote concerning her

investments, using the following language: "By this time you are in full swing again at work; 'tis awful drudgery, poor old girl. The moment I get to London, if my N. Y. centrals are up, I shall sell them and send you a couple of thousand for your investments" And, on December 15th of the same year, he wrote her, referring to the Delano Beach property, "I am not at all sorry I sent the money, darling. Don't have anything to do with Delano, if you are at all afraid of it. The money will be useful for warrants or to dress yourselves with. I want you to dress like Christians." Much more of the same character might be cited, but these are sufficient to indicate their general character. They are not the language of a man to his business agent, but rather that of a father to his daughter. The language used indicates a gift, not the creation of a trust.

The oral evidence in the record is too long to review, even were it profitable so to do, but we think that such evidence, although conflicting, justifies the conclusion of the trial court, rather than the contention of the appellant. In the main, the appellant's evidence consisted of declarations which were said to have been made by Mr. Foley to his relatives and casual acquaintances, and of admissions said to have been made by Miss Hargear subsequent to her uncle's death. Much of this, however, is as consistent with the idea of a gift as it is with the idea of agency, and much of it seems to have been incorrectly understood or reported. But, giving to it all the credence to which it is justly entitled, it does not overcome the positive evidence in the record to the contrary.

But it is needless to pursue the inquiry further. The judgment is in accord with the weight of the evidence, and should be affirmed. It will be so ordered.

MOUNT, C. J., and DUNBAR and HADLEY, JJ., concur.

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Citations of Counsel.

[No. 5470. Decided February 4, 1905.]

ROTHCHILD BROS., *Respondent*, v. RICHARD TREWELLA,
Appellant.¹

FRAUDULENT CONVEYANCES—SALE OF GOODS IN BULK—REMEDY OF CREDITORS—DIRECT LIABILITY OF PURCHASER. Upon a sale of a stock of goods in bulk without demanding a list of the vendor's creditors as required by Laws 1901, p. 222, declaring such sales void as to creditors, the purchaser is not liable to the creditors in a direct action at law, their only remedy being an action of attachment or garnishment to reach the property fraudulently conveyed.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered May 19, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action against the vendee of goods sold in fraud of creditors. Reversed.

Marshall K. Snell and *Bertha M. Snell*, for appellants.

Ellis & Fletcher, for respondent, contended, among other things, that the statute makes the purchase money a trust fund for the creditors, and imposes the duty upon the purchaser to apply it, *pro rata*, among the creditors, share and share alike. *Fitz Henry v. Munter*, 33 Wash. 629, 74 Pac. 1003. In such a case, trespass on the case or assumpsit will lie. *Griffin v. Farwell*, 20 Vt. 151; *Jones v. Steamship Cortes*, 17 Cal. 487, 79 Am. Dec. 142; *Doremus v. Hennessey*, 62 Ill. App. 391; *Heridia v. Ayres*, 29 Mass. 334; *Taylor v. Smith*, 104 Ala. 537, 16 South. 629; *Hathorn v. Calef*, 53 Me. 471; *Albert's Executrix v. Blue*, 10 B. Mon. 92; *Carter v. White*, 32 Ill. 509; 21 Ency. of Plead. & Prac., p. 905; Maxwell, Code Pleading, p. 63.

¹Reported in 79 Pac. 480.

RUDKIN, J.—Between the 8th day of February, 1902, and the 13th day of September, 1902, one Kennedy was engaged in the retail liquor business, at the town of Hoquiam, in this state. During that period he became indebted to the plaintiff in this action in the sum of \$407.05, on account of the purchase price of merchandise, to be used in the conduct of his business. On said 13th day of September, 1902, and while said Kennedy was so indebted to this plaintiff for such merchandise, he sold substantially his entire business and stock in trade, in bulk, to the defendant in this action. The defendant did not demand of, or receive from, Kennedy any statement containing the names and addresses of his creditors, or in any manner comply with the provisions of the act of March 16, 1901, Laws 1901, p. 222, commonly known as "the sale in bulk act." The defendant paid Kennedy the entire purchase price of \$3,200, and continued the business in which Kennedy had previously been engaged until the 26th day of January, 1903, when he sold out to one Heffron. No action was ever instituted against Kennedy to recover the amount of this indebtedness, and this defendant never assumed or promised to pay the same. A demurrer was interposed to the complaint in the court below, for want of sufficient facts, but the same was overruled. At the trial, the plaintiff recovered a judgment, according to the prayer of the complaint, and the defendant appeals therefrom.

The sole question presented on this appeal is this: Can a creditor of a vendor who sells property in bulk, without a compliance with the above mentioned act, maintain a direct action at law against the purchaser, to recover the amount of his debt? We think that he cannot. The only

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effect of a failure to comply with the requirements of the act, so far as the purchaser is concerned, is to render the sale fraudulent and void. It does not differ from any other transfer made in fraud of creditors, except in the matter of the proof of the fraud. It gives the creditor no direct remedy against the purchaser, either in terms or by implication. It is true that the statute was passed for the protection of creditors; but so was the statute of Elizabeth, which declares the common law on the subject of fraudulent conveyances; so was § 4575, Bal. Code, declaring conveyances, in trust for the use of the person making the same, void; so was § 4578, *id.*, declaring bills of sale, not recorded, void, where the property is left in the possession of the vendor; and so with other acts that might be enumerated. But in none of these cases, so far as we are advised, has it been held that a simple contract creditor, without judgment or lien, could maintain a direct action at law against the fraudulent grantee to recover his debt.

"If a fraudulent disposition has actually been made by the debtor of his property, a creditor cannot, in the absence of special legislation, bring an action in assumpsit against those who combined and colluded with him. Assumpsit will not lie for there is neither an express promise nor a privity from which the law will imply a promise to pay the debt of the creditor." Bump, *Fraudulent Conveyances*, § 527.

The same author says, in § 528, that an action on the case will not lie. To the same effect, see Wait, *Fraudulent Con. and Creditors' Bills*, § 62.

"A creditor of one who has made fraudulent conveyances of his property cannot recover the amount of his debt by an action of assumpsit against the fraudulent creditor." 14 Am. & Eng. Enc. Law (2d ed.), p. 351.

Nor will trespass on the case lie. *Id.* In *Adler v. Fenton*, 24 How. 407, after a review of the authorities, the supreme court of the United States says:

"In the absence of special legislation, we may safely affirm, that a general creditor cannot bring an action on the case against his debtor, or against those combining and colluding with him to make dispositions of his property, although the object of these dispositions be to hinder, delay and defraud creditors."

It seems to be firmly established that the only remedy which the law affords a creditor against a fraudulent transfer of property by his debtor is to sue his debtor, and reach the property fraudulently transferred by attachment or garnishment. These remedies would seem to be adequate in all cases where the subject of the transfer is tangible personal property. The remedy in equity is equally well defined.

"A fraudulent transfer is valid against all persons except those who proceed to appropriate the property by due course of law to the satisfaction of the grantor's debts. As it is valid against a simple contract creditor, such creditor cannot ask the aid of a court of equity to set aside the transfer, for it does not interfere with his rights. Equity has jurisdiction of fraud, but it does not collect debts. A creditor must establish his demand at law, and obtain a lien upon the property before the transfer interferes with his rights or he has any title to claim relief in equity. No creditor can be said to be delayed, hindered or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn from his reach by a fraudulent conveyance." Bump, *Fraudulent Conveyances*, § 535.

Again:

"The second prerequisite of equitable relief is that the creditor shall obtain a lien by judicial process upon the property conveyed, for it is well settled that in the absence

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of statute a creditor who has not in some way acquired a right to have satisfaction out of his debtor's property specifically, cannot come into a court of equity to impeach any conveyance made by his debtor on the ground of fraud." 14 Am. & Eng. Enc. Law, p. 324.

The only conflict of authority on any of the propositions above announced is, whether one can proceed in equity upon a mere lien by attachment or otherwise, or whether he must first obtain a judgment at law against the fraudulent grantor. Unless, therefore, a transfer, declared fraudulent and void by the act in question, differs from other transfers declared void by other acts, or by the principles of the common law, this action cannot be maintained. We can discover no logical distinction between the different classes of conveyances which the common and statutory law declare fraudulent. The remedy afforded an injured creditor must, upon principle, be the same in all cases unless the legislature has provided a different remedy. This, in our opinion, the legislature has not accomplished by the act in question. The demurrer to the complaint should have been sustained.

For this error, the judgment of the court below is reversed, with instructions to dismiss the action.

MOUNT, C. J., and FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 4745. Decided February 4, 1905.]

MORAN & COMPANY, *Respondent*, v. PERCY H. PALMER
et al., *Appellants*.¹

VENDOR AND PURCHASER—AGREEMENT TO SELL LAND—NON-PAYMENT OF PRICE—FORFEITURE—NOTICE. Where a purchaser of lots goes into possession and makes improvements under an agreement to pay a certain price within a specified time, but fails to make any payment for more than a year and a half after the same is due, the recording of a deed by the vendor to another purchaser is constructive notice that a forfeiture has been declared.

SAME—ACQUIESCENCE IN FORFEITURE. In such a case, where the purchaser makes no offer to pay for several years, but states that he will buy the property when he can get it at a satisfactory price, he acquiesces in the forfeiture of the contract.

QUIETING TITLE—POSSESSION OF PREMISES—STIPULATION AS TO TENANT. An action to quiet title to premises which are in the possession of a tenant under lease from both parties, should not be dismissed because the plaintiff is not in possession, where a stipulation was entered into between the parties that the tenant should pay no rent until the termination of the action, and should then pay to the prevailing party, since thereby the question of possession is treated as immaterial.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered February 28, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Cooley & Horan, for appellants.

Brownell & Coleman and *L. N. Jones*, for respondents.

HADLEY, J.—Respondent, a corporation, brought this suit against appellants to quiet title to certain real estate

¹Reported in 79 Pac. 476.

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in Arlington, Snohomish county. The complaint alleges ownership in respondent, and that appellants also claim to be the owners. The defendant Arthur B. Palmer separately answered the complaint, his co-defendants disclaiming any interest in the property. He avers, that, in 1890, he entered into a contract with one McLeod, the then owner of the property, for the purchase of the south twenty-three feet of lot 19 in block 6, as shown upon the plat of the town of Arlington; that he agreed to pay therefor the sum of \$150, and to improve the property by erecting a building thereon; that he immediately entered into possession; erected the building, and in all things complied with his contract; and that he has ever since been the owner in fee of said twenty-three feet. He also alleges that said McLeod and subsequent grantees of record of said property, including respondent, had full notice of his title to the property. The cause was tried before the court without a jury, and decree was entered, declaring respondent to be the owner, as against the defendants. From the judgment this appeal was taken.

The court found that a contract, for the sale of said twenty-three feet, was made by said McLeod with appellant Arthur D. Palmer, provided the latter should immediately erect thereon a frame building, and should, on or before March 31, 1891, pay to the former the sum of \$150 cash. It is further stated in the findings that said Palmer claims that the contract was in writing, while McLeod testified that it was verbal, and that the court makes no finding upon that subject, as it is admitted by Palmer that, if the contract was in writing, it was never recorded in the office of the auditor of Snohomish county, and that it is now a lost instrument.

It was further found that said Palmer, with the consent

of McLeod, went into possession of the premises, and, in the summer of 1890, erected thereon a frame building; that Palmer never paid to McLeod, or his successors in interest, the said \$150, or any part thereof; that in August, 1891, and after the expiration of the time for payment of said money under the contract, McLeod duly sold, and by deed conveyed, the property to one Magnesen, which deed was filed for record on November 25, 1892; that said Magnesen acquired the property without notice or knowledge of any claim thereto by Palmer, and that he continued to be the owner until September 4, 1900; that one Jones occupied the building as a tenant, and continued to pay rent to Palmer until 1896, when demand was made upon him by Magnesen, through his agents, for ground rent; that soon thereafter Jones ceased paying rent to any one, he being in a state of uncertainty as to who was properly entitled to it; that in September, 1900, Magnesen sold and conveyed the property to one Hanson, and that in October, 1901, the latter sold and conveyed it to respondent; that Magnesen, Hanson and respondent have paid all taxes upon the premises since 1891, and no part thereof has been paid by Palmer; that respondent, in acquiring the premises, had no notice whatever, either actual or constructive, that Palmer claimed any interest in the fee to said lot, but did have notice that he claimed to have some interest in the building thereon; that, after the purchase of the premises by Hanson, the tenant, Jones, moved out of the building, and it was then occupied by the Arlington Drug Company as a drug store; that the drug company leased the premises both from respondent and from Palmer, under an agreement that the drug company was not to pay rent to any one until the final termination of this action, and that it should then

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pay all rent to the one prevailing in the suit; that said drug company entered into a written lease with respondent for the property, and is respondent's tenant in possession.

Exceptions to certain of the foregoing findings are urged, but we think they are sufficiently sustained by evidence, and we shall not disturb them. Under the facts found, we think the contract for sale between McLeod and Palmer was terminated, and that the latter is, therefore, without interest in the land. It does not appear whether, under the terms of the contract, time of payment was of the essence of the agreement or not; but it does appear that on November 25, 1892, more than a year and a half after the money was to be paid, the deed of McLeod, conveying the property to Magnesen, was placed of record, and it then became constructive notice to Palmer that McLeod had terminated the agreement. It has been held that any reasonable notice that a forfeiture has been declared is sufficient.

"A forfeiture of a contract for the sale of land may be declared by a reasonable notice of the intention so to do, if a strict performance be not made; . . . In many instances overt acts manifesting intention have been held equivalent to notice; as where on the vendee's non-compliance the vendor, where he holds no securities of a negotiable character, sells the property to another, this has been taken as a clear manifestation of an intention to end the contract, and is held to be an unequivocal declaration of forfeiture." 2 Warvelle, Vendors (1st ed.), p. 823, § 7.

In support of the above, the case of *Warren v. Richmond*, 53 Ill. 52, is cited. The case is directly in point here. The court said:

"And to declare a forfeiture under this agreement, as he held no obligations or securities of a negotiable char-

acter, he only was required to clearly and unmistakably manifest the intention to end the contract; and by selling the property to another he did so in the most unequivocal manner."

The recording of the deed from McLeod to Magnesen was, therefore, of itself, at least some notice to Palmer that McLeod had terminated the contract. If, however, the record of the deed, a year and a half after the money should have been paid, was not, of itself, sufficient notice to Palmer of the termination of the contract, still we think his subsequent attitude, under certain testimony in the case, was such that he must be held to have confirmed the cancellation of the agreement, and to have accepted it as an accomplished fact, and that he cannot now be heard to say the contract was not terminated. In 1896 McLeod, as agent for Magnesen, made a demand upon the tenant Jones for rent. A brother of said Jones, who is an attorney, testified that he then went to Palmer, and asked him why he did not "fix the matter up," and further testified: "He said he would, as soon as he could buy it cheap enough. He could buy it cheaper after awhile. He said he would find an opportunity to buy it cheaper." And, again, the witness testified that Palmer said: "I will go up there and buy that from the old man cheap some day." From the above testimony, it is apparent that Palmer had actual notice, as long ago as 1896, that Magnesen claimed the property, and, with that knowledge and with the latter's deed upon record, he must be held to have had sufficient notice that the contract was terminated. It is also apparent that he acquiesced in the termination of the contract. He assumed the attitude of trying to buy the property when he could get it at a satisfactory price. It is true, the truth of the above testimony, so far as it relates to what Palmer said, is not admitted, but it is in

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support of the judgment, and the trial court doubtless believed it, and was influenced by it in his decision. Such conduct on the part of Palmer, and his continued neglect to pay, or offer to pay, the money, we think showed an acquiescence in the repudiation of the contract by McLeod.

"While a mere failure to pay on the day fixed will not work a forfeiture when time is not made the essence of the contract, and rigid forfeitures will never be encouraged where the delay in payment does not arise out of a desire to repudiate the contract or procrastinate payment, yet if a vendee intends to hold the contract as subsisting he must take reasonable steps to evidence his intention; and where he neglects to tender payments when due, or otherwise to perform or offer to perform agreeably to the stipulations of the contract, if the contract has been declared forfeited by the vendor, unless he can show that his failure was the result of fraud, accident or mistake, he will be presumed to have acquiesced in such repudiation of the contract by the vendor." 2 Warvelle, Vendors (1st ed.), p. 829, § 13.

The point is made by appellants that respondent can not maintain this suit, for the alleged reason that he is not in possession of the property. We think this contention cannot prevail, because of the agreement between the parties to allow the payment of rent to be suspended pending the result of this suit, and that it shall be paid to the prevailing party. The agreement, in effect, is a stipulation that the question as to who is in actual possession shall be treated as immaterial in the controversy. Moreover, the court found that the tenant in possession accepted a written lease from respondent, and its possession as tenant of respondent is the latter's possession.

The judgment is affirmed.

MOUNT, C. J., and FULLERTON and DUNBAR, JJ., concur.

[No. 4858. Decided October 22, 1904.]

CHARLES THEIS, *Appellant*, v. SPOKANE FALLS GAS LIGHT
COMPANY *et al.*, *Respondents*.¹

ON PETITION FOR REHEARING.

Appeal from a judgment of the superior court for Spokane county, Belt, J. Rehearing denied.²

Post, Avery & Higgins, for appellant.

George Ladd Munn, Thayer & Belt, and Walker & Munn, for respondents.

PER CURIAM.—The petition for rehearing in this case will be denied, but as this court is not in possession of all the facts necessary to determine the equities between the parties, arising out of legal transactions in the cause since the action was commenced, all of such questions will be submitted primarily to the trial court for determination.

[No. 5420. Decided October 28, 1904.]

THE STATE OF WASHINGTON *on the Relation of E. E. Martin,*
Plaintiff, v. SAM H. NICHOLS, *Secretary of State, Defendant*.³

Application to the supreme court for a writ of mandate, filed October 24, 1904. Denied.

Bryon Millett, for relator, cited *Hollan v. Center*, 102 Ky. 119, 43. S. W. 174.

The Attorney General, for defendant.

PER CURIAM.—This is a proceeding in mandamus, brought by the relator to compel the defendant, as secretary of state, to certify to the various county auditors of the state that the socialist party ticket, containing the names of the nominees of that party for the various state and congressional offices, is entitled to be

¹Reported in 78 Pac. 299.

²NOTE.—For former opinion, see, *s. c.*, 34 Wash. 23, 74 Pac. 1004.—REP.

³Reported in 78 Pac. 1118.

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placed in the third column on the official ballot to be used at the coming election.

The court is unanimously agreed that the application must be denied; but, owing to its inability to agree upon the grounds on which the conclusion can be rested, it reserves the right to state these grounds in detail at some future time, the exigencies of the case not permitting the announcement of the decision to be longer delayed.

[Nos. 5111-5114 (4 cases), Decided November 11, 1904.]

J. M. NOLAN, *Appellant*, v. M. H. ARNOT, *Respondent*.¹

Appeal from judgments of the superior court for King county, Bell, J., entered March 22, 1904. Reversed.

Roberts & Leehey, for appellant.

H. H. Eaton, for respondent.

PER CURIAM.—For the reasons assigned in case No. 5101, *Nolan v. Arnot* (*ante* p. 101), the judgments in these cases will be reversed.

[No. 4540. Decided December 29, 1904.]

HARR WAGNER, *Respondent*, v. M. G. ROYAL *et al.*, as *Directors of School District No. 1, of Thurston County, Respondents*, and T. N. HENRY *et al.*, *Appellants*.²

Appeal from an order of the superior court for Thurston county, Linn, J., entered July 14, 1902. Affirmed.

Frank C. Owings, for appellants.

Vance & Mitchell, and *Ballinger, Ronald & Battle*, for respondent Harr Wagner.

PER CURIAM.—This is an appeal from an order of the superior court of Thurston county, denying the petition of the appellants for leave to intervene and become parties defendant in the above entitled action. It clearly appears from the allegations of appellants' petition, and the answer tendered therewith, that this

¹Reported in 78 Pac. 1118.

²Reported in 78 Pac. 1119.

cause falls within the principles recently announced by this court on the appeal of David Lincoln, intervenor, in *Westland Publishing Co. v. Royal* (*ante* p. 399), and, on the authority of that decision, and for the reasons therein stated, the order appealed from is affirmed.

[No. 4541. Decided December 29, 1904.]

RAND, McNALLY & COMPANY, *Respondent*, v. M. G. ROYAL *et al.*, as
Directors of School District No. 1, of Thurston County,
Respondents, and T. N. HENRY *et al.*, *Appellants*.¹

Appeal from an order of the superior court for Thurston county, Linn, J., entered July 14, 1902. Affirmed.

Frank C. Owings, for appellants.

Vance & Mitchell, and Ballinger, Ronald & Battle, for respondent Rand McNally & Co.

PER CURIAM.—This is an appeal from an order of the superior court of Thurston county, denying the petition of the appellants for leave to intervene and become parties defendant in the above entitled action. It clearly appears from the allegations of appellants' petition, and the answer tendered therewith, that this cause falls within the principles recently announced by this court on the appeal of David Lincoln, intervenor, in *Westland Publishing Co. v. Royal* (*ante* p. 399), and, on the authority of that decision, and for the reasons therein stated, the order appealed from is affirmed.

¹Reported in 78 Pac. 1118.

Dec. 1904]

Opinion Per Curiam.

[No. 4529. Decided December 29, 1904.]

EATON & COMPANY, *Respondent*, v. M. G. ROYAL *et al.*, as *Directors of School District No. 1, of Thurston County, Respondents*, and T. N. HENRY *et al.*, *Appellants*.¹

Appeal from an order of the superior court for Thurston county, Linn, J., entered February 2, 1903, denying a petition for leave to intervene. Affirmed.

Frank C. Owings, for appellants.

Vance & Mitchell, and Ballinger, Ronald & Battle, for respondent Eaton & Co.

PER CURIAM.—The plaintiff above named is the publisher of the "New Era U. S. History," which history the plaintiff alleges was, on or about May 14, 1900, adopted and prescribed by the state board of education for the use, in certain designated grades, of the common schools of the state, for the period of five years from and after September 1, 1900, and which the plaintiff on said date agreed, in and by a written instrument executed by plaintiff and said board, to furnish in sufficient quantities for the use of the schools for the said term of five years. This action was instituted by plaintiff to enjoin the defendants, as the board of directors of school district No. 1, of Thurston county, from causing or permitting to be used, in the seventh and eighth grades of the schools in said district, any history other than that published by plaintiff and required to be used in said grades by the state course of study. The defendants in their answer denied the material allegations of the complaint, and stated certain new matters as and for affirmative defenses. The plaintiff demurred to the new matters alleged in the answer, and the demurrer was sustained as to each of the affirmative defenses, except the defense that the plaintiff was not the real party in interest, as to which defense the demurrer was overruled. The record is silent as to what, if any, steps were subsequently taken in the cause by the parties hereto, but at this stage of the proceedings the appellants applied to the court for leave to intervene and become parties defendant in the suit. With their petition for leave to intervene the appellants tendered an answer to plaintiff's complaint, alleging facts identical with those

¹Reported in 78 Pac. 1117.

stated in the answer of the defendants. The petition was "disallowed and dismissed" by the court, and the petitioners thereupon appealed. The question for determination in this proceeding is essentially the same as that presented on the appeal of David Lincoln, intervenor, in *Westland Publishing Co. v. Royal* (*ante* p. 399), and recently decided by this court. In that case we were constrained to hold that the petitioner had no legal interest in the matter in litigation, and consequently no right to intervene, and, for the reasons there stated, the order in question is affirmed.

[No. 5028. Decided January 4, 1905.]

H. WATERHOLTER, *Appellant*, v. WESTERN CONSTRUCTION COMPANY
et al., *Respondents*.¹

Appeal from a judgment of the superior court for Clarke county, A. L. Miller, J., entered June 23, 1903. Affirmed.

Johnson & Van Zante, Wm. D. Fenton, and E. M. Scanlon, for appellant.

B. S. Grosscup (*W. W. McCredie and A. G. Avery*, of counsel), for respondent railway company.

Cotton, Teal & Minor, and W. C. Bristol, for respondent *Ætna Indemnity Co.*

PER CURIAM.—For the reasons assigned in *Armour & Co. v. Western Construction Co.* (*ante* p. 529), just decided, the judgment in this case will be affirmed.

¹Reported in 78 Pac. 1119.

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[No. 5047. Decided January 4, 1905.]

**W. D. SAPPINGTON, Appellant, v. WESTERN CONSTRUCTION COMPANY
et al., Respondents.**¹

Appeal from a judgment of the superior court for Clarke county,
A. L. Miller, J., entered June 23, 1903. Affirmed.

*J. M. Long, Alexander Sweek, and James P. Stapleton, for ap-
pellant.*²

*B. S. Grosscup, (W. W. McCredie and A. G. Avery, of counsel),
for respondent railway company.*

*Cotton, Teal, & Minor, and W. C. Bristol, for respondent Aetna
Indemnity Co.*

PER CURIAM.—For the reasons assigned in *Armour & Co. v. Western Construction Co.* (ante p. 529), just decided, the judgment in this case will be affirmed.

[No. 5358. Decided January 26, 1905.]

**R. H. OSBORN, Appellant, v. PIONEER MUTUAL INSURANCE ASSOCIATION
of Seattle, Respondent.**³

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered January 29, 1904, upon granting a nonsuit. Affirmed.

George T. Thompson and Oscar Cain, for appellant.

H. T. Granger, for respondent.

PER CURIAM.—Action was brought to recover on an insurance policy. At the conclusion of the plaintiff's testimony, the defendant challenged the sufficiency of the testimony and moved the court for a nonsuit, which motion was sustained, and the cause dismissed at plaintiff's cost, to which orders and judgment the plaintiff excepted and his exception was duly allowed. No question is raised upon the pleadings, and no statement of facts is brought to this court. This court is therefore not in a position to review the rulings or decisions of the trial court.

The judgment is affirmed.

¹Reported in 78 Pac. 1118.

²NOTE.—For citations of counsel, see note, ante page 532.—REF.

³Reported in 79 Pac. 286.

[No. 5381. Decided January 26, 1905.]

H. N. MARTIN, *Respondent*, v. JAMES FITZPATRICK, *Appellant*.¹

Appeal from a judgment of the superior court for Lincoln county, Martin, J., entered June 18, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury. Affirmed.

Myers & Warren, for appellant.

N. T. Oaton and *Martin & Grant*, for respondent.

PER CURIAM.—Action for attorneys' fees. Judgment of \$400. This is a case which involves only questions of fact, a recital of which would be of no public or general benefit or interest. From an examination of the testimony, we are satisfied that the findings made by the trial court were justified by the testimony, and that the conclusions of law and judgment legally follow from such findings.

The judgment is affirmed.

¹Not yet reported in Pac. Rep.

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for more than ninety days, and, after motion to dismiss the appeal, prepared and filed a transcript without giving any excuse for the delay, the appeal will be dismissed for failure to diligently prosecute it (Fullerton, C. J., and Anders, J., dissenting). *Ellis v. Bardin*.....122

17. **APPEAL AND ERROR—STATEMENT OF FACTS—CORRECTION BY SUPPLEMENTAL STATEMENT—MANDATE.** Where a statement of facts certified by the trial court to the supreme court is not complete, essential matters having been omitted, it may, under Bal. Code § 5060, be corrected by a supplemental statement in accordance with the facts, at any time before the hearing of the appeal, and the trial court will be required by mandate to certify such supplemental statement. *State ex rel. Klein v. Superior Court*.... 44
18. **APPEAL—REVIEW—STATEMENT OF FACTS.** An order refusing to vacate the satisfaction of a judgment, made after a hearing, can not be reviewed on appeal where the facts on which it was based are not brought up by a statement of facts. *Barto v. Stanley*....150
19. **APPEAL—STATEMENT OF FACTS—NONSUIT—REVIEW.** In the absence of a statement of facts the supreme court can not review the ruling of the trial court upon a motion for a nonsuit challenging the sufficiency of the evidence. *Osborn v. Pioneer Mut. Ins. Co*695
20. **APPEAL AND ERROR—STATEMENT OF FACTS—NECESSITY—REVIEW OF FINDINGS—RECORDS—REDEMPTION FROM TAX SALES—INSPECTION.** Upon application for a writ of mandate to compel the county treasurer to allow an inspection of certain records in his office, being copies of certificates of redemption from tax sales, a finding of the trial court that the same were not public records required by law to be kept, cannot be reversed on appeal where the evidence on which the finding was based is not brought up by a statement of facts. *State ex rel. Cook v. Reed*.....638
21. **APPEAL—REVIEW—STATEMENT OF FACTS—AFFIDAVITS—HOW BROUGHT UP.** Upon an appeal from a judgment dissolving a temporary injunction, based upon the complaint and the evidence in the form of affidavits submitted, there can be no reversal where the affidavits are not brought up in a bill of exceptions or statement of facts, and the appeal will be dismissed on motion. *Anderson v. McGregor*..... 124

VIII. BRIEFS.

22. **APPEAL AND ERROR—BRIEFS—STIPULATION—ASSIGNMENT OF ERRORS.** A stipulation that appellant might file a supplemental

APPEAL AND ERROR—CONTINUED.

brief "citing additional points and authorities," is not intended to authorize a new assignment of error, and the same will not be considered. *Crane Co. v. Pacific Heat & Power Co.*..... 95

IX. MOTIONS AND DISMISSALS.

Failure to file transcript. See APPEAL AND ERROR, 16.

Injunction, without finding of insolvency. See APPEAL AND ERROR, 4.

Not taken in time. See APPEAL AND ERROR, 11, 13.

X. REVIEW.

Findings as to good faith. See ADVERSE POSSESSION, 2.

Harmless error in instructions. See TRIAL, 4-6.

Proof of demand for proofs of loss. See BENEFICIAL ASSOCIATIONS, 2.

Review of verdicts. See TRIAL, 7.

Review of findings outside issues. See JUDGMENTS, 2.

24. APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS—MOTION TO STRIKE. It is not prejudicial error to refuse to strike out averments from a complaint which amount to conclusions of law. *Rand, McNally & Co. v. Royal*.....420
25. APPEAL AND ERROR—REVIEW—DEMURRER TO COMPLAINT—APPEAL FROM APPOINTMENT OF RECEIVER. Upon an appeal from an order appointing a temporary receiver, an order made at the time of the appointment, overruling a demurrer to the complaint, can not be urged as error where the complaint is not so defective as to be incapable of amendment, since it is not a final order and is reviewable only on appeal from a final judgment. *Belding v. Washington Cornice Co.*.....549
26. APPEAL AND ERROR—REVIEW—ORDER REFUSING TO DISSOLVE AN ATTACHMENT. Upon an appeal from an order refusing to dissolve an attachment of the property of a foreign corporation, error in sustaining a demurrer to the defendant's answer can not be reviewed on the theory that the answer showed that the court was without jurisdiction, since the test of jurisdiction was the status of the case upon the issuance of the attachment, which if rightful, is not affected by subsequent proceedings. *Hunter v. Wenatchee Land Co.*.....541
27. APPEAL AND ERROR—REVIEW—EVIDENCE OF ADMITTED FACTS. It is not an error to exclude evidence of facts which are admitted. *Charlton v. Markland*.....40
28. APPEAL AND ERROR—EVIDENCE OF ADMITTED FACTS. It is not prejudicial error to exclude evidence of the verdict of a coroner's

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- jury which could only tend to prove admitted facts. *Knapp v. Order of Pendo*.....601
29. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—INCOMPETENT EVIDENCE UPON ESTABLISHED FACT. Where plaintiffs' title depended upon a state contract, the admission in evidence of an incompetent certificate of the state land commissioner to the effect that all payments had been made and that it was in full force, is harmless error when the fact had been established by competent evidence, and was not denied by any evidence on the part of the defendant. *Lounsdale v. Grays Harbor Boom Co*..... 198
30. APPEAL—IMMATERIAL EVIDENCE—WHEN HARMLESS. Error cannot be predicated upon the admission of evidence which was not material or prejudicial. *Herzog v. Palatine Insurance Co*.....611
31. APPEAL—REVIEW—EXCLUDING EVIDENCE—HARMLESS ERROR. It is not reversible error to permit cross-examination on a subject not gone into on the examination-in-chief, where the party might have obtained the same testimony in rebuttal. *Knapp v. Order of Pendo*.....601
32. APPEAL AND ERROR—JUDGMENT IN NAME OF FIRM—HARMLESS ERROR. In a proceeding to determine conflicting claims to money in court, the appellant, whose claim was denied, can not claim error in that the order directed the money to be paid to respondent's firm, instead of to respondent individually. *Zilke v. Woodley* 84
33. APPEAL AND ERROR—REVIEW—AMOUNT OF RECOVERY. Error in that the amount of a verdict was too small cannot be urged in the supreme court when the evidence upon which the same was based is not included in the record on appeal. *Swope v. Seattle*.....113
34. APPEAL AND ERROR—TRIAL—INSTRUCTIONS—HARMLESS ERROR. It is not error to refuse requested instructions that are covered by instructions already given. *Young v. O'Brien*.....570
35. APPEAL—TRIAL—READING LAW TO JURY—INSTRUCTIONS. Error can not be predicated upon the refusal of the trial court to allow counsel to read a decision of the supreme court to the jury, where the instructions which were given the jury are not brought up in the record. *Swope v. Seattle*.....113
36. APPEAL AND ERROR—NUISANCE—INSTRUCTIONS—HARMLESS ERROR—ISSUES FOUND IN FAVOR OF APPELLANT. In an action for damages to land unlawfully detained, and for an injunction to abate a nuisance, which was tried to a jury, instructions to the jury upon the subject of the nuisance are not prejudicial to the defendant where the jury failed to find that defendant was main-

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- taining a nuisance and the cause of action therefor was dismissed. *Lounsdale v. Grays Harbor Boom Co.*..... 198
37. APPEAL—REVIEW—VERDICT—EXCESSIVE DAMAGES. A verdict for the rental value of land will not be set aside as excessive, when there was evidence to justify it, although it reaches the extreme limit. *Id.*..... 198
38. APPEAL AND ERROR—REVIEW—NOMINAL DAMAGES—CONTESTED OVER COSTS. The appellate court will not reverse a judgment for error in refusing to give nominal damages, since an appeal will not be entertained for the purpose of determining who is entitled to costs. *Commercial Inv. Co. v. Nat. Bank of Com.*.....287
39. APPEAL AND ERROR—INSTRUCTIONS—DAMAGES—HARMLESS ERROR—ISSUES FOUND IN FAVOR OF APPELLANT. Error in an instruction on the subject of damages for obstructing a river is not prejudicial, where the jury found no damages against appellant upon that branch of the case. *Lounsdale v. Grays Harbor Boom Co.* 198
40. CRIMINAL LAW—INSTRUCTIONS—COMMENT ON FACTS. It is unlawful comment on the facts and reversible error for the trial judge to recall the jury, after they have deliberated for eighteen hours, and, in urging them to agree upon a verdict, to state that it is a very plain case, that they ought to arrive at a verdict without any trouble, and that he can see no reason why they should hesitate, since that was clearly insinuating that the verdict should be guilty. *State v. Thield*.....365
41. APPEAL AND ERROR—REVIEW—TRIAL—CONFLICTING INSTRUCTIONS—CURING ERROR. Where, of two conflicting instructions, it is impossible to determine which one the jury adopted, an erroneous instruction will not be held cured by a subsequent one correctly stating the law governing the subject. *State v. Williams*.....143
42. APPEAL—REVIEW—TRIAL—IMPROPER ARGUMENT OF COUNSEL—EXCEPTIONS. Error can not be predicated upon improper argument of counsel to the jury, upon exceptions thereto, unless the trial court is moved to act in the matter, and exceptions are taken to its refusal to act. *State v. Van Waters*.....358
43. SAME—CURING ERROR. Where an attorney is rebuked for commenting on matters outside of the record, and the jury is told to disregard the statements, the error is sufficiently cured. *Id.*.....358
44. APPEAL AND ERROR—REVIEW—FINDINGS. Findings of the trial court will not be disturbed where the evidence is conflicting and evenly balanced. *Grays Harbor Boom Co. v. Lytle L. & M. Co.*...151

APPEAL AND ERROR—CONTINUED.

45. CRIMINAL LAW—TRIAL—VERDICT—EVIDENCE—SUFFICIENCY. A verdict will not be set aside in a criminal case where the direct evidence of the prosecuting witness is corroborated on all the material issues. *State v. Van Waters*.....358
46. APPEAL—REVIEW—FINDINGS. Where, in an action tried by the court after waiving a jury, the evidence is not brought up and the findings are within the issues, and warrant the conclusions of law, the merits of the case are not reviewable. *Spencer v. Commercial Co*.....374
47. APPEAL—REVIEW. Findings will not be disturbed when sustained by the evidence. *Esmond v. Gillies Log & Mercantile Co*..499
48. APPEAL AND ERROR—REVIEW—FINDINGS. In an action upon an alleged contract to purchase and hold lands for the use and benefit of plaintiff, findings for the defendants, dismissing the action, must be sustained where the only testimony was that of the plaintiff, who did not refer to the making of the contract or to any violation thereof. *Showalter v. Showalter*.....624

XI. DETERMINATION AND DISPOSITION OF CAUSE.

Compelling lower court to issue execution on affirmance. See MANDAMUS, 2.

Reduction of judgment on appeal. See INSURANCE, 7.

49. APPEAL AND ERROR—DECISION—CRIMINAL LAW—EXCESSIVE SENTENCES. The power of the appellate court to reduce an excessive sentence being doubted, the propriety of reducing a sentence from twenty-five years to five years is suggested to the pardoning power. *State v. Van Waters*.....358
50. APPEAL AND ERROR—DECISION—ATTORNEY'S FEES—COSTS. Upon remanding a case wherein the only error was in allowing an attorney's fee in the sum of \$100, the judgment will be affirmed except as to said sum, with instructions to the lower court to modify the decree, the costs of the appeal to be taxed in favor of the appellant. *Spencer v. Commercial Co*.....374
51. APPEAL AND ERROR—DECISION—JUDGMENT OF SUPREME COURT FOR COSTS—TAX FORECLOSURE PROCEDURE—EXECUTIONS. Where, upon an appeal from a tax foreclosure judgment, the supreme court affirms the judgment and enters a judgment for costs against the appellants and the sureties for a specified sum, and directs that execution issue therefor, the appellant is entitled to have execution issued out of the superior court for the collection of the costs, although the supreme court judgment does not in terms follow the direction of the statute as to the disposition of

APPEAL AND ERROR—CONTINUED.

the funds deposited with the county treasurer, the same being applied by law and the order of the lower court as a credit on the tax judgment. *State ex rel. Jefferson County v. Hatch*.....184

52. **CERTIORARI—DECISION—PROHIBITION.** Upon reversing an order of the superior court, which directed the disbursement of the funds of the estate, for the reason that the same was without notice to the heirs and void, a writ of prohibition will not be issued to enjoin the lower court from making further orders without due notice. *In re Sullivan's Estate*.....217

APPOINTMENT:

Of receiver. See **APPEAL AND ERROR**, 15, 25; **RECEIVER**, 1, 2.
Of guardian. See **GUARDIAN AND WARD**, 1.

APPROPRIATION:

Of waters, title of act. See **STATUTES**, 2.

ASSAULT WITH INTENT TO MURDER:

See **CRIMINAL LAW**, 6.

ASSESSMENTS:

Bank stockholders, upon insolvency of bank. See **APPEAL AND ERROR**, 1, 2, 9; **BANKS AND BANKING**, 4.
Compensation for property taken for public use. See **EMINENT DOMAIN**, 1, 2, 4.
Liability of stockholders to assessment on stock. See **CORPORATIONS**, 5-7.

ASSIGNMENTS:

See **BILLS AND NOTES**, 1-3.
Of corporate shares to avoid liability. See **CORPORATIONS**, 7.
Of drafts, evidence. See **INTERPLEADER**, 1.
Of error. See **APPEAL AND ERROR**, 22.

1. **ASSIGNMENT—ACTIONS—PARTIES.** The assignee of the rights of parties entitled under a contract to certain shares of stock, may bring an action in his own name for a violation of the contract. *Grant v. Walsh*..... 190
2. **ASSIGNMENT—DRAFTS LEFT WITH BANKS—DIRECTIONS TO APPLY AMOUNT COLLECTED.** The delivery of drafts to a bank for collection, under an agreement between the payees and their creditor that the amount due him shall be credited to his account, amounts to an equitable assignment, and, upon collection by the bank, the title to the money passes to the creditor. *Zilke v. Woodley*.....84

ASSOCIATIONS:

See **BENEFICIAL ASSOCIATIONS.**

ASSUMPTION:

Of risk by employee. See **MASTER AND SERVANT**, 1, 5, 7.

ATTACHMENT:

Of insolvent corporation, preferences. See **CORPORATIONS**, 2, 3.
Dissolution and review of ruling. See **APPEAL AND ERROR**, 26.

1. **ATTACHMENTS—DISSOLUTION.** The dissolution of an attachment is within the discretion of the court. *Gehres v. Orlowski*..... 156

ATTORNEY AND CLIENT:

Advice of counsel. See **MALICIOUS PROSECUTION**, 1.
Fees of attorney employed by executor or administrator. See **EXECUTORS AND ADMINISTRATORS**, 3.
Fees, reduction of. See **APPEAL AND ERROR**, 50.
Fees taxable. See **COSTS**, 1.
Opening statement of counsel at trial. See **TRIAL**, 2.

BANKRUPTCY:

Findings of bankruptcy court, conclusiveness. See **EXEMPTIONS**, 1.

BANKS AND BANKING:

Drafts for collection, proceeds of. See **ASSIGNMENTS**, 2.

1. **BANKS—LIABILITY OF STOCKHOLDERS TO CREDITORS—LIMITATION OF ACTION—WHEN RIGHT OF ACTION ACCRUES.** The superadded liability of stockholders to the creditors, under the constitution, attaches and a right of action thereon accrues to the receiver immediately upon the declared insolvency of the bank. *Bennett v. Thorne*.....253
2. **BANKS—LIABILITY OF STOCKHOLDERS TO CREDITORS—LIMITATION OF ACTIONS—EXHAUSTING ASSETS OF INSOLVENT CORPORATION.** The rule that the stockholders' liability to creditors for the debts of the corporation is secondary has no application to the limitation of actions, but only to the equitable application of the funds, and does not require that the primary assets be exhausted and applied before recourse be had against the stockholders. *Id.*..... 253
3. **LIMITATION OF ACTIONS—TOLLING THE STATUTE—STOCKHOLDERS' LIABILITY—DELAY OF RECEIVER.** It is against the policy of the law to put it within the power of a party to toll the statute of limitations, and the failure of a receiver to take the necessary steps to enforce the stockholder's liability does not prolong the statute;

APPEAL AND ERROR—CONTINUED.

2. **APPEAL AND ERROR—APPEALABLE ORDERS—SPECIAL PROCEEDING TO LEVY ASSESSMENT AGAINST STOCKHOLDERS.** Where the right to levy an assessment against stockholders of an insolvent bank, and the amount of such assessment, is determined by the court upon a petition filed in the receivership action, after notice to the stockholders and a hearing, at which the stockholders appeared and demurred to the petition and evidence was introduced in support of the allegations, the order fixing the amount and levying the assessment is appealable as a final order or judgment in a special proceeding in which the receiver for the creditors on the one hand, and the stockholders on the other hand, are the adverse parties and finally concluded by the matters determined in the order. *Id.*.....253
3. **APPEAL—FINAL ORDERS—VACATION OF JUDGMENT.** An order vacating a judgment of foreclosure of a tax certificate, which also quashes the service of summons, sets aside the tax deed, and directs redemption from the tax upon payment of the same, with costs, is appealable as a final judgment, although there is no formal order of dismissal of the action, since it effects a disposition of the whole case. *Nolan v. Arnot*.....101
4. **APPEAL—APPEALABLE ORDERS—INJUNCTION—DISSOLUTION—FINDING OF INSOLVENCY.** An order dissolving a temporary injunction is not appealable, under Pierce's Code, § 1048, unless the court has found that the party enjoined was insolvent, as such finding is jurisdictional to the appeal. *Anderson v. McGregor*.....124

III. PRESERVATION OF GROUNDS.

5. **APPEAL AND ERROR—EVIDENCE—FAILURE TO OBJECT.** Error cannot be predicated upon the admission of testimony received without objection or motion to strike. *Young v. O'Brien*.....570
6. **APPEAL AND ERROR—REVIEW—OBJECTIONS.** The supreme court will not consider objections to evidence not made below. *Knapp v. Order of Pendo*.....601
7. **APPEAL AND ERROR—EXCEPTIONS—SUFFICIENCY.** Error in allowing an attorney's fee is properly presented for review in the appellate court by excepting to the allowance when first set forth in the conclusions of law; and, when it is part of the judgment, it is deemed excepted to, and need not be urged in the court below. *Spencer v. Commercial Co.*.....374

IV. PARTIES.

Stranger to proceedings before land commissioner. See PUBLIC LANDS, 2.

APPEAL AND ERROR—CONTINUED.

8. **APPEAL—PARTIES—SERVICE OF NOTICE—APPEAL BY INTERVENORS—CORPORATION NECESSARY PARTY TO APPEAL.** Where, in an action brought against a corporation by a stockholder, temporary injunctions are issued, after an appearance and contest by the corporation, restraining the corporation and its officers and stockholders from holding a stockholders' meeting, during the pendency of the action, and subsequently certain stockholders intervene in their own right, and appeal from an order refusing to dissolve the temporary injunctions, the corporation is a necessary party to the appeal, and interested therein, upon whom service of notice of the appeal by the intervenors must be made, or the appeal will be dismissed. *Willard v. Fisher*.....229
9. **APPEAL—PARTIES ENTITLED TO APPEAL—ASSESSMENT OF BANK STOCKHOLDERS.** Stockholders of an insolvent corporation are parties entitled to appeal from an order levying an assessment upon their liability to creditors, entered upon a petition filed in the receivership action, where they were, by order of court, served with notice of the hearing, and appeared and contested the matter as stockholders, although they were not nominal parties to the action, and were not named in the petition for the assessment, and the question as to who held the stock was not determined; since the special proceeding affected the rights of stockholders and concluded all who were before the court at the hearing. *Bennett v. Thorne*.....253
10. **APPEAL—PARTIES—SURETIES ON COST BOND—SERVICE OF NOTICE UPON.** Sureties upon the cost bond of a nonresident plaintiff against whom no judgment is entered, are not necessary parties to the appeal upon whom notice of the appeal need be served. *Wagner v. Royal*.....428
- V. **REQUISITES FOR TRANSFER OF CAUSE.**
 - Notice, upon whom to be served. See **APPEAL AND ERROR**, 8.
 - Time for taking, from land commissioners. See **PUBLIC LANDS**, 2.
11. **APPEAL—DISMISSAL—TIME OF TAKING—JUDGMENT—ENTRY—ESTOPPEL.** Where the clerk of court makes an informal journal entry of judgment upon a verdict, and a new trial is denied, affirming the judgment, the successful party by subsequently entering a formal judgment is estopped from asserting that the same is not the final judgment in the case, and an appeal therefrom will not be dismissed because not taken within 90 days from the date of the clerk's journal entry or from the date of the order denying the new trial. *Herzog v. Palatine Insurance Co.*...611

APPEAL AND ERROR—CONTINUED.

12. **APPEAL—DISMISSAL—BOND—FORM AND SUFFICIENCY.** Where the bond on appeal runs to the State of Washington, instead of to the adverse party, as required by Bal. Code, § 6505, but obligates the appellant to pay all costs, etc. awarded against it, and the intent is manifest to execute it for the benefit of the respondents, the appeal will not be dismissed, especially in view of Laws, 1899, p. 79, providing that appeals shall not be dismissed for defects in the bond, if upon order the party perfect the appeal. *Westland Publishing Co. v. Royal*.....399
13. **APPEALS—JUDGMENT IN TAX LIEN FORECLOSURE—APPLICATION OF SPECIAL APPEAL ACT.** The special provisions of Laws 1903, p. 74, § 4, requiring appeals from the judgment in an action to foreclose a tax lien to be taken within thirty days, applies to suits by individual holders as well as county suits, and to all judgments against the owner of the land which are final in effect; hence an appeal by defendant from an order denying a motion to vacate a judgment of foreclosure, will be dismissed if not taken within thirty days (Fullerton, C. J., dissenting). *Brown v. Davis*.....135
14. **APPEAL—BOND—TAX LIEN FORECLOSURE—SPECIAL APPEAL ACT.** The plaintiff in a tax lien foreclosure may appeal from a judgment denying his right to foreclose, by giving an appeal bond under the general law of appeals, since the special provisions of Laws 1897, p. 186, as amended by Laws 1903, p. 75, requiring the bond on an appeal from a tax judgment to be served at the time of taking the appeal, conditioned for the payment of the tax, applies only to appeals by the party registering the tax. *Nolan v. Arnot*101

VI. EFFECT AND STAY.

15. **APPEAL AND ERROR—EFFECT OF SUPERSEDEAS ON APPEAL FROM APPOINTMENT OF RECEIVER—MANDAMUS.** An appeal from an order appointing a receiver, with a supersedeas bond given, does not affect the trial of the case on the merits, and mandamus will lie to compel the judge of the superior court to set the case for trial in its regular course where he refuses to do so on account of such an appeal. *State ex rel. Anderson v. Bell*.....196

VII. RECORD.

Time of arraignment, failure of record to show. See CRIMINAL LAW, 13, 14.

16. **APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT.** Where the appellant fails to file any transcript, or order the same prepared,

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for more than ninety days, and, after motion to dismiss the appeal, prepared and filed a transcript without giving any excuse for the delay, the appeal will be dismissed for failure to diligently prosecute it (Fullerton, C. J., and Anders, J., dissenting). *Ellis*

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20. APPEAL AND ERROR—STATEMENT OF FACTS—NECESSITY—REVIEW OF FINDINGS—RECORDS—REDEMPTION FROM TAX SALES—INSPECTION. Upon application for a writ of mandate to compel the county treasurer to allow an inspection of certain records in his office, being copies of certificates of redemption from tax sales, a finding of the trial court that the same were not public records required by law to be kept, cannot be reversed on appeal where the evidence on which the finding was based is not brought up by a statement of facts. *State ex rel. Cook v. Reed*.....638
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VIII. BRIEFS.

22. APPEAL AND ERROR—BRIEFS—STIPULATION—ASSIGNMENT OF ERRORS. A stipulation that appellant might file a supplemental

CARRIERS—CONTINUED.

that day, and the car was unloaded on the next day. *Normile v. Northern Pac. R. Co.*..... 21

6. **CARRIERS — DELIVERY — REASONABLE TIME — QUESTION OF LAW.**
Where there is no dispute as to the material facts, the question as to the reasonable time for the removal of goods shipped is one of law for the court. *Normile v. Northern Pac. R. Co.*..... 21

CAUSA MORTIS:

See GIFTS, 1, 2.

CERTIORARI:

1. **RECEIVERS—DISCHARGE—REVIEW BY CERTIORARI—RECEIVER NOT A PARTY.** A writ of review to review an order discharging a receiver will not lie upon the application of the receiver, as he is not a party interested therein or aggrieved thereby. *State ex rel. Casedy v. Inter-State, etc., Co.*..... 50
2. **CERTIORARI—REVIEW OF ORDERS DIRECTING PAYMENT OF ALLOWANCE TO ADMINISTRATOR—APPEALABLE ORDERS—ADEQUACY OF REMEDY BY APPEAL.** Certiorari will lie to review ex parte orders made in the matter of an estate directing the payment of specified sums to the administrator and his attorney, and future allowances, where the amount of the supersedeas bond on appeal is indefinite, and the lower court has refused to fix any amount therefor, and the fruits of the appeal would be unprotected during the resort to the appellate court for a supersedeas, since the remedy by appeal is neither speedy nor adequate, especially where the sums were paid out of rentals of the real estate, which under the statute descends directly to the heirs. *In re Sullivan's Estate.*.. 217

CHARACTER:

Of accused in criminal prosecutions. See CRIMINAL LAW, 10, 11.

CHOSE IN ACTION:

Assignment. See ASSIGNMENTS.

CITIES:

See MUNICIPAL CORPORATIONS.

CITIZENS:

See ALIENS.

Equal protection of laws. See CONSTITUTIONAL LAW, 1-6.

CLASS LEGISLATION:

See CONSTITUTIONAL LAW, 1-7.

CLOUD ON TITLE:

See QUIETING TITLE.

COMMERCE:

Carriage of goods and passengers. See CARRIERS.

COMMON CARRIERS:

See CARRIERS.

COMMON LAW:

Bond, as common law obligation. See INDEMNITY, 11.

Superseded. See FRAUDS, STATUTE OF, 1, 5.

1. COMMON LAW—STATUTES. The common law of England, as adopted by the territorial law of 1863, continues to be the law of this state, except so far as modified by statute. *Richards v. Redelsheimer* 325

COMMUNITY PROPERTY:

See HUSBAND AND WIFE, 1-3; MECHANIC'S LIENS, 1.

COMPLAINT:

In civil actions. See PLEADINGS, 1-4.

COMPROMISE AND SETTLEMENT:

Settlement in divorce, out of court. See DIVORCE, 2.

COMPUTATION:

Of time for taking appeal. See APPEAL AND ERROR, 11.

CONDEMNATION:

Taking property for public use. See EMINENT DOMAIN, 1-6.

CONDITIONS:

In contracts. See CONTRACTS, 1-4; COVENANTS, 1.

In policy. See BENEFICIAL ASSOCIATIONS, 1-3; INSURANCE, 1-7.

CONFESSION:

Admissibility in evidence. See CRIMINAL LAW, 12.

CONFLICT OF LAWS:

Lex loci contractus. See ALIENS, 1.

CONSTITUTIONAL LAW:

Due process. See EMINENT DOMAIN, 1-6

Subjects and titles of statutes. See STATUTES, 1, 2.

1. BARBERS—REGULATION OF—REVOCATION OF LICENSE TO PRACTICE TRADE—CONSTRUCTION OF ACT. Laws 1901, p. 345, providing for the licensing of barbers, and creating a board to regulate the practice of the trade, gives such board power to revoke a certificate for the causes specified, issued to barbers who were following the occupation at the time the act went into effect as well as to those who were not, there being no distinction between "certificates" to such barbers, and "certificates of registration" to barbers who afterwards apply and take the examination. *State v. Chaney* 350
2. SAME—PENALTY FOR PRACTICE—REVOCATION OF LICENSE. Laws 1901, p. 349, providing a penalty for following the occupation of a barber without first having obtained a license, applies to one whose license had been regularly revoked, and who continued to practice without obtaining another license. *Id.*..... 350
3. CONSTITUTIONAL LAW—LIBERTY OF CONTRACT—POLICE POWERS—LICENSING OF BLACKSMITHS. Laws 1901, p. 118, requiring horse shoers to pass an examination and pay a license fee and providing a penalty for practicing their trade without a license, is not a valid exercise of the police power, but is unconstitutional, as an arbitrary interference with personal liberty and private property without due process of law. *In re Aubrey*..... 308
4. DENTISTRY—LICENSE TO PRACTICE—CONSTITUTIONAL LAW. The legislative power to restrict and regulate occupations which affect the public comfort and health extends to the practice of dentistry. *In re Thompson*..... 377
5. SAME—ARBITRARY RULES. Laws 1901, p. 315, § 1, providing for the examination and licensing of dentists, is not unconstitutional as a delegation of legislative power to a board, by reason of the fact that the board of examiners may adopt arbitrary rules; since it will be presumed that the rules will be reasonable, and, if void or arbitrary, they may be reviewed and do not render the act void. *Id.*..... 377
6. SAME—QUALIFICATIONS OF DENTISTS—REASONABLENESS OF REGULATIONS. Laws 1901, p. 315, § 1, providing, as qualifications of dentists, that the applicant for a license to practice shall be possessed of a diploma from a dental college in good standing, shall be of good moral character, etc., contains no unreasonable requirements. *Id.* 377

CONSTITUTIONAL LAW—CONTINUED.

7. LABOR—PUBLIC WORKS—EIGHT-HOUR DAY—CONSTITUTIONAL LAW—RIGHT OF CONTRACT. An ordinance prescribing an eight-hour day, and forbidding the employment for longer hours of any laborer upon municipal construction work, making the same a part of all city contracts for such work, and providing a penalty for any violation thereof by any city contractor, is not unconstitutional as in conflict with the fourteenth amendment or any other federal or state constitutional provision, since the same relates only to public works, and the state has a right to do its work in any manner it sees fit, and no violation of private rights is involved. *In re Broad*..... 449

CONTINUANCE:

1. CONTINUANCE—DISCRETION OF COURT. The denial of an application for a continuance to enable the defense to procure an original paper is not error where no abuse of discretion is shown. *Knapp v. Order of Pendo*..... 601

CONTRACTS:

Agreements within statute of frauds. See FRAUDS, STATUTE OF. Action on, form. See PLEADINGS, 2.

Assignment. See ASSIGNMENTS.

Constitutional guaranty of liberty to contract. See CONSTITUTIONAL LAW, 7.

Contracts of particular classes of parties. See ALIENS, 1; CABRIERS, 4. By Indians, see INDIANS, 1, and REPLEVIN, 2.

Contracts relating to particular subjects. See PUBLIC LANDS.

1-3; SCHOOLS AND SCHOOL DISTRICTS, 5-7, 16.

Building, delay, breach. See INDEMNITY, 6-10.

For teacher's salary, enforcing. See MANDAMUS, 4.

For sale of beer, evidence of, sufficiency. See RECEIVERS, 1.

To locate timber claims. See FRAUDS, 2, 3.

Privity, bond of contractor, common law obligation. See INDEMNITY, 11.

Particular classes of contracts. See COVENANTS; INDEMNITY; INSURANCE.

Leases. See LANDLORD AND TENANT.

Sales of Realty. See VENDOR AND PURCHASER.

Suretyship. See PRINCIPAL AND SURETY.

To convey land. See FRAUDS, STATUTE OF, 8-10.

1. CONTRACTS—CONSTRUCTION—PERFORMANCE—CERTIFICATE OF ENGINEER. Where a railroad contract for the clearing of a right of

CONTRACTS—CONTINUED.

way provides for payment upon the certificate of the chief engineer that the same has been fully completed, a certificate that he has "accepted" the work is all that is required. *Eastham v. Western Construction Co.*..... 7

2. **SAME—AGREEMENT FOR CUTTING WOOD—AMOUNT CALLED FOR.** Where a railroad contract for clearing right of way at a stated price per acre, contains the following: "Cutting cord wood 2 ft. long, not to exceed 1,000 cords . . . \$1.50," the contractor is not required to cut 1,000 cords, but it is optional with him to cut any amount not exceeding 1,000 cords, at \$1.50 per cord. *Id.*.... 7
3. **CONTRACTS—AGREEMENT FOR SECURITY OF PARTIES FURNISHING SUPPLIES TO LOGGING CAMP—CONSTRUCTION.** Where plaintiffs furnished supplies to a logger, cutting timber upon the lands of, and under contract with, the defendant company, until about two thousand dollars was due them, when, for the purpose of security, a written agreement was entered into whereby the logger authorized the defendant company to pay the "labor claims incurred" in cutting "said timber," and certain other specified amounts, and authorized the payment of any balance, due the logger under the contract, to the plaintiffs from month to month, until their claims were paid, the deduction for the labor claims is not to be confined to current claims, but comprehends all claims for such labor, and does not render the defendant company personally liable, except to the extent of the balance due the logger remaining in its hands. *Esmond v. Gillies Log. & Mercantile Co.*..... 499
4. **SAME.** In such case it is not error to receive evidence of the amount of the labor claims incurred and advanced by the defendant company prior to the making of such contract, since they were comprehended therein, and there was no intention to place the defendant in a worse position than it was in before making the contract. *Id.*..... 499

CONTRIBUTORY NEGLIGENCE:

See NEGLIGENCE, 1.

Of passenger. See CARRIERS, 3.

Of persons injured by runaway team. See ANIMALS, 3.

Of servant. See MASTER AND SERVANT, 1.

CONVEYANCES:

In fraud of creditors. See FRAUDULENT CONVEYANCES.

CONVERSION:

Action for, form. See PLEADINGS, 2.

1. **CONVERSION—DEFENSES—VENDEE OF PROPERTY WRONGFULLY CONVEYED—ASSUMPTION OF VENDOR'S OBLIGATION—PLEADINGS—AMENDMENTS.** In an action to recover the value of a building which had been converted by a third party and sold to the defendant, who refused on demand to return it or pay its value, it is not error to refuse to permit the defendant to amend its answer to show that it had not assumed the obligations of its vendor, since such fact was immaterial and no defense to the action. *Tebbetts v. Northern Commercial Co.*..... 599

CORPORATIONS:

See BANKS AND BANKING; BENEFICIAL ASSOCIATIONS; MUNICIPAL CORPORATIONS.

Acquisition of property by condemnation. See EMINENT DOMAIN, 1, 3.

Assessment of stockholders. See APPEAL AND ERROR, 1, 2, 9; BANKS AND BANKING.

Party to appeal, when. See APPEAL AND ERROR, 8.

1. **CORPORATIONS—CAPITAL A TRUST FUND FOR CREDITORS—RECEIVER TO ENFORCE.** The capital stock of an insolvent corporation is impressed with a trust for the benefit of the creditors, and the receiver is the proper party to enforce the same. *Mitchell v. Jordan* 645
2. **CORPORATIONS—INSOLVENCY—ASSETS A TRUST FUND—ATTACHMENT—PREFERENCE.** The assets of an insolvent corporation are a trust fund for the benefit of all its creditors, and a creditor can acquire no preference by the levy of a writ of attachment. *State ex rel. Kirsch v. Superior Ct.*..... 91
3. **SAME—RECEIVERS—POSSESSION OF ATTACHED PROPERTY.** As between the receiver of an insolvent corporation, and a creditor having a prior attachment lien, the solvency of the corporation at the time the writ was levied determines the right to the possession of the attached property. *Id.*..... 91
4. **SAME—DETERMINATION OF INSOLVENCY—PARTIES.** Where a corporation is adjudged insolvent and a receiver appointed, without bringing in or concluding a creditor holding a prior attachment, but the creditor subsequently becomes a party to the suit by intervention, the question of the solvency of the corporation may be thereafter determined in the same action, upon the receiver's petitions alleging insolvency and a citation to the cred-

CORPORATIONS—CONTINUED.

itor directing him to show cause why he should not surrender the property, at which time he may litigate the question. *Id.*..... 91

5. SAME—DISTRIBUTION OF ASSETS AMONG STOCKHOLDERS IN FRAUD OF CREDITORS—STOCK HELD AS SECURITY. Where the stockholders of an insolvent corporation sold all the assets and divided the same among themselves by declaring a dividend, a party who held a majority of the stock as security for advances made by him to purchase a stock of goods for the company, and who received part of the assets in repayment of his advances with notice of the fraud upon creditors, is liable to the extent of the amount received, in an action brought by the receiver of the company in the interest of a creditor who had obtained a judgment against the company upon which execution was returned unsatisfied. *Mitchell v. Jordan*..... 645
6. SAME. The fact that such party agreed to surrender his stock to the other stockholders upon repayment of his advances, does not entitle him to claim that his position was not that of a stockholder, as between himself and creditors of the corporation. *Id.* 645
7. CORPORATIONS—STOCKHOLDERS—STOCK NOT FULLY PAID IN—ASSESSMENT ON STOCK—DEFENSE OF BONA FIDE PURCHASE. In a proceeding in bankruptcy to assess the stockholders of an insolvent corporation upon stock not fully paid up, a stockholder cannot interpose the defense that he was a bona fide purchaser of stock represented to him as fully paid up, where it appears that, after the original stock was duly subscribed by the promoters, part of it was turned into the treasury as treasury stock to be sold as the needs of the company required, and that defendant purchased part of such treasury stock at one-fourth its par value after fully going into the financial affairs of the corporation, and part of it after becoming a trustee of the corporation, since he is not a bona fide purchaser without notice. *Campbell v. McPhee* 593

COSTS:

Reduction of attorney's fee. See APPEAL AND ERROR, 50.

Sureties on cost bond. See APPEAL AND ERROR, 10.

1. COSTS—ATTORNEY'S FEES. In an action for damages for breach of the covenants of a lease, it is error to allow an attorney's fee of \$100 in addition to the statutory fee. *Spencer v. Commercial Co.* 374

COUNTIES:

Right to inspect records of. See RECORDS, 1, 2.

1. COUNTIES—SALE OF COUNTY PROPERTY—NOTICE FIXING MINIMUM PRICE—POWER OF COMMISSIONERS. Under LAWS 1903, p. 73, providing that the county commissioners may order property sold when they deem it for the best interests of the county, they have power to order a sale fixing a minimum price below which bids will not be received; and were it otherwise the restriction could not be treated as surplusage, and a sale for a less sum upheld, since the board did not exercise its discretion to order an unqualified sale. *State ex rel. Mackay v. Phillips*, 651

COURTS:

Mandamus to inferior courts. See MANDAMUS, 1-5.

Prohibition to inferior courts. See PROHIBITION, 1-3.

Province of court and jury. See TRIAL, 1-5.

Review of decisions. See APPEAL AND ERROR, 24-48.

COVENANTS:

In insurance policies. See INSURANCE, 1-3.

1. COVENANTS—BREACH—DAMAGES—ASSUMPTION OF MORTGAGE—FAILURE TO PAY—MEASURE OF DAMAGES—PARTIAL RESCISSION. Where, upon the settlement of various differences and indebtedness, the plaintiff conveyed certain lands to the defendant, subject to mortgages, under an agreement that the defendant should pay off all the mortgage indebtedness and save the plaintiff from costs or suits thereon, a breach of defendant's covenant in failing to pay one certain mortgage whereby plaintiff was subjected to a suit thereon, does not entitle the plaintiff, after full performance, to rescind the contract in part, and recover as damages the whole consideration for such broken covenant, since the contract is an entirety and must be rescinded as a whole, if at all, and the remedy is found in an action for the actual damages sustained. *Commercial Inv. Co. v. Nat. Bank of Com.*..... 287
2. SAME—COMPLAINT—SUFFICIENCY. In such a case, where the complaint alleges that the plaintiff elects to recover damages rather than have a rescission of the contract, and claims damages in the sum of \$45,595.78 as the difference between the value of the property and the amount received for it, and it further appears by the pleadings that the mortgage, which went to foreclosure in violation of defendant's covenant to save plaintiff from suit thereon, was finally paid by the defendant and the judgment satisfied, and plaintiff's complaint alleges no special damages on account of such mortgage or suit thereon, it was not error, on defendant's motion for judgment on the pleadings, to hold that

COVENANTS—CONTINUED.

no cause of action was stated in the complaint on which substantial damages could be recovered, as the plaintiff was entitled only to nominal damages under the facts shown. *Id.*..... 287

CREDITORS' SUIT:

Remedies in cases of fraudulent conveyances. See FRAUDULENT CONVEYANCES, 1-5.

CRIMINAL LAW:

I. INFORMATION AND DEFINITIONS.

1. CRIMINAL LAW—BURGLARY—ATTEMPTS—LIEN OF LIVERY STABLE KEEPER—GENERAL OWNER DEPRIVING KEEPER OF SPECIAL PROPERTY—INFORMATION—SUFFICIENCY. An information charging the owner of horses with unlawfully breaking and entering the livery and boarding stable wherein they were kept by another, who had a valid lien upon and special property in the horses for his charges in feeding and caring for them, with intent to fraudulently and feloniously take the horses from and to deprive such keeper of his lien and the amount due him, which is specified, is not demurrable for want of sufficient facts to state an offense, since the lien of the keeper is property in himself secured by his possession, of which the general owner was attempting to feloniously deprive him. *State v. Nelson*..... 126
2. CRIMINAL LAW—BURGLARY—INFORMATION—UNOCCUPIED OUTHOUSE. Under Bal. Code, § 7104, an information which charges an attempted burglary of an outhouse adjoining a dwelling is demurrable if it fails to allege that the same was "occupied therewith," since the common law rule and definition of dwelling has been modified by the statute. *State v. Randall*..... 438
3. CRIMINAL LAW—EMBEZZLEMENT—INFORMATION—SUFFICIENCY. An information for embezzlement by the secretary of a society is not demurrable for want of sufficient facts or lack of certainty when it charges that, on a certain day, the defendant was agent of the society and was intrusted by the society with certain moneys belonging to the society, and converted the same to his own use; and it was not necessary to make it more certain by stating the acts constituting the conversion, showing the particular transaction relied upon. *State v. Bogardus*..... 297
4. LARCENY—VALUE OF HORSE STOLEN—INSTRUCTIONS AS TO VALUE. It being unnecessary, under Bal. Code, § 7113, to allege the value of stolen cattle, if of any value, it is not error to refuse to instruct the jury with reference to the value of a stolen horse,

CRIMINAL LAW—CONTINUED.

when it appears without dispute that it was valuable. *State v. Washing* 485

6. SEDUCTION—CONDITIONAL PROMISE OF MARRIAGE SUFFICIENT. Under Bal. Code, § 7066, prescribing the punishment for any person who shall "seduce and debauch any unmarried woman of previous chaste character," seduction under a promise of marriage is not essential to constitute the crime of seduction, any seductive promises being sufficient; and, if an engaged woman finally submits relying upon a conditional promise to marry immediately in case of trouble, there is sufficient evidence to go to the jury. *State v. O'Hare*..... 516

II. EVIDENCE.

6. CRIMINAL LAW—EVIDENCE OF IDENTITY—SUFFICIENCY—QUESTION FOR JURY. In a prosecution for assault with intent to murder, in which the prosecuting witness positively identifies the prisoner as the person who shot him, the question of identity was for the jury, although the prosecuting witness stated shortly after the shooting, upon accusing the prisoner, who thereupon became angry, that he might have been mistaken as it was dark. *State v. Williams*. 143
7. CRIMINAL LAW—EMBEZZLEMENT—EVIDENCE—SUFFICIENCY—VARIANCE. Under an indictment charging the secretary of a society with the embezzlement of \$1,000 intrusted to him by the society on October 3, 1902, there is sufficient proof of the crime charged where it appears that, prior to that time, the defendant was short in his accounts in excess of said sum, having failed to credit \$2,000 previously paid by one W for stock, that on said date, said W having withdrawn on orders \$1,000, the previous receipt for \$2,000 to him was taken up and a new one issued for \$1,000 of the society's stock, and that no record of any kind was made of these transactions, and no notice given to the officers; since the deposit of such stock with the society without crediting it to the account of W and defendant's use of it to reduce his own indebtedness to the society, was an embezzlement by the defendant, under Bal Code § 7119, fixing the crime upon any agent who "shall convert to his own use or shall fail to account" for any property intrusted to him (Fullerton, C. J., and Anders, J., dissenting). *State v. Bogardus*..... 297
8. LARCENY—EVIDENCE—SUFFICIENCY. When the larceny of a twenty dollar gold piece was actually seen, and is testified to positively, there is sufficient evidence to warrant a conviction, the

CRIMINAL LAW—CONTINUED.

credibility of the witness being entirely for the jury. *State v. Johnson* 294

9. CRIMINAL LAW—LARCENY—EVIDENCE—UNIDENTIFIED MONEY—CORROBORATING CIRCUMSTANCE. In a prosecution for the larceny of a twenty dollar gold piece, which the prosecuting witness testified positively was taken from his pocket by the defendant in a certain room, where the defendant was at once arrested and denied the possession of the money, or that it was in the room, a twenty dollar gold piece found secreted in the room within half an hour after the arrest is admissible as a circumstance corroborating the witness, although he was unable to identify it. *Id.* 294
10. CRIMINAL LAW—EVIDENCE OF OTHER CRIMES—IMPEACHMENT OF WITNESS—ATTEMPT TO CORRECT INADVERTENT STATEMENTS OF WIFE. It is reversible error to permit the state, upon cross-examination of the accused's wife, to show that the accused had been convicted of another crime some years before, and it is not a sufficient excuse that the same was shown to correct the statement that she had married the accused about the year 1898, at which time he was in prison, the same being an inadvertence, she having married him in 1899. *State v. Eder* 482
11. SAME—CREDIBILITY OF WITNESS—IMPEACHMENT OF WIFE OF ACCUSED BY FACT OF FORMER CONVICTION. It is not permissible, on the cross-examination of the accused's wife, for the state to show that the accused had been convicted of another crime some years before, and before their marriage, in order to affect the credibility of the wife, since the fact tends directly to prejudice the accused, and only remotely, if at all, to discredit the witness. *Id.* 482
12. CRIMINAL LAW—CONFESSIONS—STATEMENTS MADE BEFORE COMMITTING MAGISTRATE—VOLUNTARY, ALTHOUGH ACCUSED NOT INFORMED OF HIS RIGHT TO REFUSE TO ANSWER. It is not error to receive, as a voluntary confession, evidence of statements made by an Indian before a committing magistrate, upon being charged with horse stealing, in answer to questions put by the magistrate, although he was not represented by counsel and was not informed of his right to refuse to answer, where, in answer to the question whether he stole the horse, he answered that he had not and volunteered, "I brand him," and other statements followed whereby he attempted to explain his acts, since enough appears to show, *prima facie*, that the statements were voluntary. *State v. Washington* 485

CRIMINAL LAW—CONTINUED.

III. TRIAL—INSTRUCTIONS.

See APPEAL AND ERROR, 41-43, 45, 49.

Disqualification of juror. See JURY, 4, 5.

Excessive sentence, power to reduce. See APPEAL AND ERROR, 49.

13. APPEAL AND ERROR—RECORD—REVIEW—CRIMINAL LAW—TRIAL—ARRAIGNMENT—BRINGING TO TRIAL WITHIN SIXTY DAYS. The denial of a motion to dismiss a prosecution, made upon entering a plea forty-five days after the filing of the information, on the ground that there had been such a delay in the arraignment that the prisoner was unable to prepare for trial within sixty days from the time the information was filed, will not be reviewed on appeal where the record does not show at what time the appellant was arraigned, since the court can not presume that it was delayed beyond a reasonable time, or that no sufficient cause appeared for the delay. *State v. Van Waters*..... 358
14. SAME—ABUSE OF DISCRETION. The denial of a motion to dismiss a prosecution, made at the commencement of the trial sixty-three days after the filing of the information, upon the ground that the prisoner was not brought to trial within sixty days, under Bal. Code § 6911, so requiring unless good cause is shown for the delay, will not be reversed except for abuse of discretion, and can not be reviewed where the record on appeal fails to show the order of the court setting the cause for trial, or the proceedings had thereon, since the order must be presumed regular and on sufficient cause. *Id.*..... 358
15. CRIMINAL LAW—INFORMATION—VARIANCE—IDEM SONANS. It is not a fatal variance between an indictment and the proof upon a prosecution for larceny from the person of one Shuter, that the name was misspelled in the indictment with a double "t," since they are *idem sonans*. *State v. Johnson*..... 294
16. CRIMINAL LAW—INFORMATION—CERTAINTY—BILL OF PARTICULARS. There is no provision in our criminal procedure for attacking an information for lack of certainty by motion to make more definite and certain, or by demand for a bill of particulars, but the remedy is by demurrer. *State v. Bogardus*..... 297
17. SAME—BILL OF PARTICULARS—DISCRETION. In such a case, it is not an abuse of discretion to refuse to require the state to furnish a bill of particulars, and such refusal can be reversed only for abuse of discretion. *Id.*..... 297
18. CRIMINAL LAW—INFORMATION—AMENDMENT—TRIAL—EFFECT OF SUSTAINING DEMURRER TO INFORMATION AND EVIDENCE—DISCHARGE.

CRIMINAL LAW—CONTINUED.

A prisoner is not entitled to a discharge upon the sustaining of a demurrer to an information or to the evidence, since it is the duty of the court to correct errors and allow an amendment, and a mistrial upon an insufficient information does not constitute jeopardy and is not a bar to another prosecution. *State v. Riley*..... 441

19. CRIMINAL LAW—TRIAL—INDORSEMENT OF NAMES OF WITNESSES ON INFORMATION. It is not error to permit the state to indorse on the information the names of additional witnesses on the day before the trial. *State v. Van Waters*..... 358
20. CRIMINAL LAW—ASSAULT WITH INTENT TO KILL—INTENT NOT PRESUMED WHEN DEATH DOES NOT RESULT—INSTRUCTIONS. Upon a prosecution for assault with intent to kill, in which it appears that the prosecuting witness was shot in the hip, and death did not result, the intent to kill being an essential fact to be established by evidence and which can not be presumed as a matter of law, it is error to instruct that every person is presumed to intend the natural consequences of his acts, and that such presumption will always prevail unless the jury entertain a reasonable doubt as to the intent. *State v. Williams*..... 143
21. SAME. For the same reason it is error to instruct that such shooting would have been murder in the first degree in case death had resulted, if the shot had been fired in the attempt to perpetrate a robbery. *Id.*..... 143

CRUELTY:

Ground for divorce. See DIVORCE, 1.

DAMAGES:

See MALICIOUS PROSECUTION, 3.

Breach of contract to buy books. See SCHOOLS AND SCHOOL DISTRICTS, 1-15.

Breach of contract of carriage. See CARRIERS, 4, 5.

Breach of contract to convey land. See FRAUDS, STATUTE OF, 8-10.

Breach of covenant, nominal damages. See COVENANTS, 1, 2.

Compensation for property taken for public use. See EMINENT DOMAIN, 2, 3, 6.

For fraud. See FRAUD, 1.

Measure of, in ejectment. See EJECTMENT, 1.

Nominal damages, harmless error as to. See APPEAL AND ERROR, 39.

Remote. See PROHIBITION, 3.

Runaway team. See ANIMALS, 1.

DAMAGES—CONTINUED.

1. **DAMAGES—EXCESSIVE—AMOUNT ADMITTED.** The defendant can not claim that damages for stock killed are excessive, where the amount found was the sum admitted in its answer. *Curtis v. Oregon R. & Nav. Co.*..... 55
2. **DAMAGES—VERDICT WHEN NOT EXCESSIVE.** A verdict for \$1,350 for injuries sustained in the fall of an elevator will not be disturbed as excessive where the plaintiff was severely injured in his foot, which injury might be troublesome for a long time, and the weakness in his foot decreased his earning ability as a carpenter, since it does not appear to be the result of passion or prejudice. *Young v. O'Brien.*..... 570

DANGEROUS PREMISES:

See NEGLIGENCE, 1.

Fall of elevator in office building. See CARRIERS, 1.

Right of way, licensee. See RAILROADS, 1, 2, 7, 8.

DECEDENTS:

Estates. See EXECUTORS AND ADMINISTRATORS.

DEEDS:

Quitclaim, as memorandum of sale. See FRAUDS, STATUTE OF, 9.

DELIVERY:

Of gift. See GIFTS, 1, 2.

DEMAND:

For jury. See JURY, 1, 2.

DENTISTS:

Regulation and license. See CONSTITUTIONAL LAW, 4-6.

DISABILITIES:

Of aliens. See ALIENS, 1.

DISCOVERY:

1. **DISCOVERY—INTERROGATORIES—ANSWER—SUFFICIENCY—DISMISSAL OF ACTION.** It is not error to refuse to strike a complaint and dismiss the action for refusing to answer interrogatories, where they were answered as soon as objections were disposed of; and, if not sufficiently full and explicit, the remedy is by motion to make more specific. *Knapp v. Order of Pendo.*..... 601

DISSOLUTION:

Of attachment. See ATTACHMENT, 1.

DIVORCE:

1. **DIVORCE—CRUEL TREATMENT—ADULTERY—BOTH PARTIES AT FAULT—DOWNFALL OF WIFE CAUSED BY HUSBAND.** In an action for divorce brought by the husband upon the ground of adultery on the part of the wife, in which she applies for divorce upon the ground of cruel and inhuman treatment, it is not error to grant the wife a divorce, although the evidence indicates that she was guilty of adultery, where it appears that the husband by constant charges of infidelity, threats, blows, abusive language and frequent intoxication drove the wife from home and was largely instrumental in causing her downfall, and they are unable to live together. *Richardson v. Richardson*..... 272
2. **DIVORCE—DIVISION OF PROPERTY—SETTLEMENT OUT OF COURT INDUCED BY FRAUD.** Where the parties to a divorce action have community personal property of the value of \$23,000, besides real estate, and pending the suit the wife is induced to sign an agreement whereby she accepted about \$2,500 as her portion of the property, and the evidence shows an armed attack, by the husband, upon the house in which she was living with a co-respondent, made the night before the settlement, threats of prosecution, misrepresentations, and that the wife was not apprised of her rights, the settlement is properly disregarded; since such settlements should not be enforced unless fairly made and reasonably just. *Id.* 272
3. **SAME—DIVISION OF PROPERTY.** In an action for a divorce where the community personal property, consisting largely of stock, is worth about \$23,000, but the testimony as to value is exceedingly meager, and there was no testimony as to the value of large holdings of real estate, it is error, where the property should be evenly divided, to decree the payment to the wife of \$15,000 within sixty days, and the cause will be remanded for further evidence as to the value of the property and an even division thereof. *Id.*.... 272
4. **SAME—CUSTODY OF CHILDREN.** Although both parents are unfit to have the custody of children of tender age, the exigencies of this case require that the older children be awarded to the father and the younger to the mother. *Id.*..... 272
5. **DIVORCE—JUDGMENT—VACATION—FRAUD IN PROCURING DECREE.** A finding that a decree of divorce was procured by false representations of the husband, which prevented the wife from acquiring knowledge of her rights or that the action was for a divorce,

DIVORCE—CONTINUED.

is alone sufficient to sustain an order vacating the decree. *State ex rel. Weidert v. Superior Ct.*..... 81

DUE PROCESS OF LAW:

See CONSTITUTIONAL LAW, 1-7.

DWELLING:

Outbuildings, subject of burglary when. See CRIMINAL LAW, 2.

EASEMENTS:

Acquisition by prescription. See ADVERSE POSSESSION, 3-6.

EJECTMENT:

Quieting title, by one out of possession. See QUIETING TITLE, 3.

1. EJECTMENT—DAMAGES FOR DETENTION—RENTAL VALUE—INSTRUCTIONS. In an action to recover damages for the unlawful detention of land, an instruction upon the measure of damages stating that the rental value is to be determined with reference to the uses to which the lands are suitable, "or such as may be reasonably expected in the immediate future" would be error if intended to authorize the determination of past rental value by its future rental value; but when, from the context of the whole instruction, such expression evidently referred to the beginning of defendant's occupancy, and not to rental value in the future, the same is not erroneous. *Lounsedale v. Grays Harbor Boom Co.*.. 198

ELECTIONS:

To annex territory to city, review, remedy by appeal. See PROHIBITION, 1-3.

ELEVATORS:

Fall of, negligence of owner of building. See CARRIERS, 1; MASTER AND SERVANT, 2-5.

EMBEZZLEMENT:

See CRIMINAL LAW, 3.

EMINENT DOMAIN:

Title of act, irrigation. See STATUTES, 2.

1. EMINENT DOMAIN—CONSTITUTIONAL LAW—DUE PROCESS—NOTICE. By Laws 1899, p. 261, for the condemnation of rights of way for irrigation purposes, the filing of a complaint and the issuance and service of a summons, as in civil cases, and the assessment of

EMINENT DOMAIN—CONTINUED.

damages by a jury, provides ample notice and due process of law, although the law contains no express provision that the plaintiff shall maintain the requirements of the statute at the trial, since that is jurisdictional and follows as a matter of course. *Weed v. Goodwin* 31

2. SAME—PROVISION FOR DAMAGES ASIDE FROM VALUE OF LAND. Laws 1899, p. 261, for the condemnation of rights of way for purposes of irrigation, sufficiently provides for the assessment of damages aside from the value of the land taken by directing the jury to "determine the value of the land occupied and damages," and authorizing judgment "for the full amount of the value of the land and damages." *Id.* 31
3. EMINENT DOMAIN—EVIDENCE—DAMAGES. In an action to ascertain the damages to abutting owners by a change of grade, it is proper to exclude mortality tables showing the expectancy of plaintiffs' lives, and, also, evidence as to the effect upon their health that might result from climbing the flight of steps made necessary by the improvement. *Swope v. Seattle* 113
4. EMINENT DOMAIN—INJUNCTION AGAINST CITY IMPROVEMENT UNTIL DAMAGES ARE PAID—DAMAGES—ASSESSMENT BY JURY WITHOUT REGULAR CONDEMNATION PROCEEDINGS. Where an action is brought by an abutting property owner to enjoin a city from further damaging the plaintiffs' property in improving a street, until compensation shall first be paid therefor, and a jury is called at plaintiff's request for the purpose of assessing damages, it is not error to submit to the jury, over plaintiff's objection, the question of what future damages the plaintiffs will suffer by the city's completion of the improvement, where no prejudice appears from the mere fact that the damages were not ascertained by a jury impaneled in a regular condemnation proceeding. *Id.* 113
5. SAME—STATEMENTS BY CONTRACTOR—HEARSAY. In such an action it is proper to exclude the statements of the contractor as to plaintiffs' damages, since that would be hearsay as against the city. *Id.* 113
6. SAME—DAMAGES—VALUE OF SOIL. Where an abutting lot is sloped off to meet a change of grade in the street, the soil which is removed is not land taken, and the actual value thereof is not to be added to the damages to the land not taken. *Id.* 113
7. EMINENT DOMAIN—STATE LANDS—CONDEMNATION OF SCHOOL LANDS BY WATER COMPANY. There is no authority in this state for the condemnation of state school lands by a water company for the purpose of procuring water for domestic purposes, since

EMINENT DOMAIN—CONTINUED.

the statutes do not expressly so provide, and they must be strictly construed. *State ex rel. Att'y Gen. v. Superior Court*.. 381

EQUITY:

- Assessment of stockholders. See **APPEAL AND ERROR**, 1.
- Equitable assignment. See **ASSIGNMENTS**, 2.
- Powers, impressing lien on money in court. See **LOGS AND LOGGING**, 3, 4.

ESTOPPEL:

- Entry of judgment, date, preparation of formal order. See **APPEAL AND ERROR**, 11.
- Of surety, by notice of suit. See **INDEMNITY**, 10.

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- Harmless error in rulings on. See **APPEAL AND ERROR**, 27-31.
- Hearsay. See **EMINENT DOMAIN**, 5.
- Incorporation in record on appeal. See **APPEAL AND ERROR**, 17-21.
- Instructions as to. See **CRIMINAL LAW**, 20, 21; **TRIAL**, 4-6.
- Newly discovered, as ground for new trial in civil action. See **NEW TRIAL**, 1.
- Objections for purposes of review. See **APPEAL AND ERROR**, 5, 6; **INDEMNITY**, 3, 4.
- Reception at trial. See **TRIAL**, 3.
- As to particular facts or issues.* See **GIFTS**, 1-3.
- Adverse use, sufficiency. See **ADVERSE POSSESSION**, 5, 6.
- Amount of recovery. See **DAMAGES**, 1, 2.
- Boundary lines. See **ADVERSE POSSESSION**, 1; **BOUNDARIES**, 1, 2.
- Contributory negligence of passenger. See **CARRIERS**, 3.
- Contract, admissibility. See **INTERPLEADER**, 1.
- Fraud, knowledge of purchaser. See **FRAUD**, 2, 3.
- Identity. See **CRIMINAL LAW**, 6.
- Intoxication. See **MALICIOUS PROSECUTION**, 6.
- Justice's dockets. See **MALICIOUS PROSECUTION**, 4.
- Payments. See **PLEADINGS**, 1.
- Possession of property. See **FIRES**, 1, 2.
- Reasonable notice of delivery of goods. See **CARRIERS**, 6.
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- credibility of the witness being entirely for the jury. *State v. Johnson* 294
9. CRIMINAL LAW—LARCENY—EVIDENCE—UNIDENTIFIED MONEY—CORROBORATING CIRCUMSTANCE. In a prosecution for the larceny of a twenty dollar gold piece, which the prosecuting witness testified positively was taken from his pocket by the defendant in a certain room, where the defendant was at once arrested and denied the possession of the money, or that it was in the room, a twenty dollar gold piece found secreted in the room within half an hour after the arrest is admissible as a circumstance corroborating the witness, although he was unable to identify it. *Id.*..... 294
10. CRIMINAL LAW—EVIDENCE OF OTHER CRIMES—IMPEACHMENT OF WITNESS—ATTEMPT TO CORRECT INADVERTENT STATEMENTS OF WIFE. It is reversible error to permit the state, upon cross-examination of the accused's wife, to show that the accused had been convicted of another crime some years before, and it is not a sufficient excuse that the same was shown to correct the statement that she had married the accused about the year 1898, at which time he was in prison, the same being an inadvertence, she having married him in 1899. *State v. Eder* 482
11. SAME—CREDIBILITY OF WITNESS—IMPEACHMENT OF WIFE OF ACCUSED BY FACT OF FORMER CONVICTION. It is not permissible, on the cross-examination of the accused's wife, for the state to show that the accused had been convicted of another crime some years before, and before their marriage, in order to affect the credibility of the wife, since the fact tends directly to prejudice the accused, and only remotely, if at all, to discredit the witness. *Id.* 482
12. CRIMINAL LAW—CONFESSIONS—STATEMENTS MADE BEFORE COMMITTING MAGISTRATE—VOLUNTARY, ALTHOUGH ACCUSED NOT INFORMED OF HIS RIGHT TO REFUSE TO ANSWER. It is not error to receive, as a voluntary confession, evidence of statements made by an Indian before a committing magistrate, upon being charged with horse stealing, in answer to questions put by the magistrate, although he was not represented by counsel and was not informed of his right to refuse to answer, where, in answer to the question whether he stole the horse, he answered that he had not and volunteered, "I brand him," and other statements followed whereby he attempted to explain his acts, since enough appears to show, *prima facie*, that the statements were voluntary. *State v. Washington* 485

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13. APPEAL AND ERROR—RECORD—REVIEW—CRIMINAL LAW—TRIAL—ARRAIGNMENT—BRINGING TO TRIAL WITHIN SIXTY DAYS. The denial of a motion to dismiss a prosecution, made upon entering a plea forty-five days after the filing of the information, on the ground that there had been such a delay in the arraignment that the prisoner was unable to prepare for trial within sixty days from the time the information was filed, will not be reviewed on appeal where the record does not show at what time the appellant was arraigned, since the court can not presume that it was delayed beyond a reasonable time, or that no sufficient cause appeared for the delay. *State v. Van Waters*..... 358
14. SAME—ABUSE OF DISCRETION. The denial of a motion to dismiss a prosecution, made at the commencement of the trial sixty-three days after the filing of the information, upon the ground that the prisoner was not brought to trial within sixty days, under Bal. Code § 6911, so requiring unless good cause is shown for the delay, will not be reversed except for abuse of discretion, and can not be reviewed where the record on appeal fails to show the order of the court setting the cause for trial, or the proceedings had thereon, since the order must be presumed regular and on sufficient cause. *Id*..... 358
15. CRIMINAL LAW—INFORMATION—VARIANCE—IDEM SONANS. It is not a fatal variance between an indictment and the proof upon a prosecution for larceny from the person of one Shuter, that the name was misspelled in the indictment with a double "t," since they are *idem sonans*. *State v. Johnson*..... 294
16. CRIMINAL LAW—INFORMATION—CERTAINTY—BILL OF PARTICULARS. There is no provision in our criminal procedure for attacking an information for lack of certainty by motion to make more definite and certain, or by demand for a bill of particulars, but the remedy is by demurrer. *State v. Bogardus*..... 297
17. SAME—BILL OF PARTICULARS—DISCRETION. In such a case, it is not an abuse of discretion to refuse to require the state to furnish a bill of particulars, and such refusal can be reversed only for abuse of discretion. *Id*..... 297
18. CRIMINAL LAW—INFORMATION—AMENDMENT—TRIAL—EFFECT OF SUSTAINING DEMURRER TO INFORMATION AND EVIDENCE—DISCHARGE.

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18. **CRIMINAL LAW—INFORMATION—AMENDMENT—TRIAL—EFFECT OF SUSTAINING DEMURRER TO INFORMATION AND EVIDENCE—DISCHARGE.**

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purchase, since the representations of a vendor, familiar with machinery, amount to a warranty, when relied upon by purchasers unfamiliar therewith, and who are induced to purchase by such representations. *Northwestern Lumber Co. v. Callendar*.....492

2. FRAUD—CONTRACT TO LOCATE TIMBER CLAIMS—RESCISSION—KNOWLEDGE OF PARTY—VIEW OF PREMISES. Where parties are seeking to recover money paid upon a contract, whereby they were located upon certain timber claims, for false representations respecting the location and character of the claims, it is not error to confine the testimony respecting fraud to the period after the parties returned from viewing the land, where, acting upon their own knowledge and with means of knowledge, they subsequently closed the transaction, and paid the balance due. *Zilke v. Woodley*.....84
3. SAME—FALSE REPRESENTATIONS—EVIDENCE—SUFFICIENCY. Findings of the trial court against the claim of fraud and false representations respecting the location and character of timber claims, including a contract to locate thereon, will not be disturbed where the parties subsequently view the lands, consulted with the officers of the land department, and afterwards paid the balance due on the contract. *Id.*.....84

FRAUDS, STATUTE OF:

Oral guaranty of note. See BILLS AND NOTES, 2.

1. FRAUDS, STATUTE OF—LEASES—ORAL AGREEMENT FOR LEASE. Under the English statute of frauds an oral agreement for a lease will be a lease at will only. *Richards v. Redelsheimer*.....325
2. SAME—COMMON LAW. Bal. Code, § 4517, providing that contracts evidencing any incumbrance upon real estate shall be by deed, modifies the common law respecting oral leases for less than one year. *Id.*.....325
3. SAME—LEASES FOR LESS THAN ONE YEAR. Bal. Code, § 4568, providing that leases for less than one year may be in writing, without seal or acknowledgment, modifies § 4517, providing that they shall be by deed. *Id.*.....325
4. SAME—SPECIAL PROVISIONS NOT CONTROLLED BY GENERAL ACT. Bal. Code, §§ 4517 and 4568, respecting leases for less than one year, being special statutes, are not affected by the general statute of frauds, Bal. Code, § 4576, which, consequently, can have no application to leases of real property. *Id.*..... 325
5. SAME—LEASES FOR LESS THAN ONE YEAR—COMMON LAW SUPERSEDED. The English statute of frauds is entirely superseded by

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- our statutory enactments, and an oral lease of real estate for less than one year is within our statute of frauds and void, and the same is not a lease at will, as under the English common law. *Id.* 325
6. SAME—ORAL AGREEMENT TO EXECUTE A LEASE. There is no distinction between an oral agreement to execute a lease of real estate and an oral lease, and they are both within our statute of frauds. *Id.*..... 325
7. SAME—LEASE FROM MONTH TO MONTH. If an oral lease is good at all, it is as a lease from month to month, under Bal. Code, § 4569, and then only upon such part performance, by delivery of possession, as will take the same out of the operation of the statute of frauds. *Id.*..... 325
8. FRAUDS, STATUTE OF—ORAL AGREEMENT TO CONVEY LANDS—DAMAGES FOR BREACH OF CONTRACT—TRIAL—NONSUIT ON OPENING STATEMENT. An action for damages for breach of a contract to convey lands, seeking to recover the value of the lands, which had been fully paid for and quitclaimed to the plaintiff by the defendants before they acquired any title, and which the defendants afterward sold to a bona fide purchaser, cannot be maintained and a nonsuit is properly ordered, where it appears from the opening statement of counsel that the agreement to convey was oral, since it is within the statute of frauds. *Chamberlain v. Abrams*..... 587
9. SAME—QUITCLAIM DEED AS MEMORANDUM OF SALE. A quitclaim deed is not a sufficient memorandum to take an oral sale of lands out of the operation of the statute of frauds, when the grantors had no title at the time of the conveyance. *Id.*..... 587
10. SAME—PAYMENT AS PART PERFORMANCE. Payment of the purchase price is not a sufficient part performance of an oral agreement to convey lands to take the same out of the operation of the statute of frauds. *Id.*..... 587

FRAUDULENT CONVEYANCES:

1. FRAUDULENT CONVEYANCES—SALES—STOCK OF GOODS IN BULK—PURCHASER TRUSTEE FOR CREDITORS—GARNISHMENT AFTER DISPOSAL OF GOODS. One who buys a stock of merchandise in bulk, without complying with the statute requiring him to demand a list of the vendor's creditors and to see that the purchase price is applied to their payment, holds the property in trust for such creditors, and is liable to them in an action of garnishment, although he is not indebted to the vendor and has disposed of the goods. *Kohn v. Fishbach*..... 69

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2. FRAUDULENT CONVEYANCES—SALES—STOCK OF GOODS IN BULK—STATUTES—CONSTRUCTION. Pierce's Code, § 5346, regulating the sale of "any stock of goods, wares, and merchandise in bulk," applies to a sale of all the goods, wares, and merchandise of a person engaged in conducting a boarding house and restaurant. *Plass v. Morgan*.....160
3. FRAUDULENT CONVEYANCES—SALES OF STOCK OF GOODS IN BULK—LIST OF CREDITORS—GENERAL AND SPECIAL CREDITORS—STATUTES—CONSTRUCTION. Laws 1901, p. 222, requiring the purchaser of a stock of goods in bulk to demand a list of all the vendor's creditors, and prescribing a form of affidavit to be made by the vendor which shall specify all his creditors, with the amount of the indebtedness, and further specifying that no creditors holding claims for goods sold or money loaned to carry on the business have been omitted from the list, is intended to protect all creditors, and a sale without complying with the statute is void as to general creditors, since the last clause of the affidavit relating to a special class can not change the scope of the statute expressly applying to all creditors. *Eklund v. Hopkins*.....179
4. FRAUDULENT CONVEYANCES—SALES—STOCK OF GOODS IN BULK—PURCHASER TRUSTEE FOR CREDITORS—GARNISHMENT. One who buys a stock of merchandise in bulk, without complying with the statute requiring him to demand a list of the vendor's creditors and to see that the purchase price is applied to their payment, holds the property in trust for such creditors, and is liable to them in an action of garnishment. (*Kohn v. Fishback*, ante p. 69, followed). *Holford v. Trewella* 654
5. FRAUDULENT CONVEYANCES—SALE OF GOODS IN BULK—REMEDY OF CREDITORS—DIRECT LIABILITY OF PURCHASER. Upon a sale of stock of goods in bulk without demanding a list of the vendor's creditors as required by Laws 1901, p. 222, declaring such sales void as to creditors, the purchaser is not liable to the creditors in a direct action at law, their only remedy being an action of attachment or garnishment to reach the property fraudulently conveyed. *Rothchild Bros. v. Trewella*.....679

GARNISHMENT:

Of vendee under sale in fraud of creditors. See FRAUDULENT CONVEYANCES, 1, 4, 5.

1. GARNISHMENT—PROCESS—SERVICE ON DEFENDANT BY PUBLICATION. A garnishee cannot object that judgment was rendered against the principal defendant, who was out of the state, upon a service by publication. *Holford v. Trewella*..... 654

GIFTS:

1. **GIFTS—MORTIS CAUSA—VALIDITY—CHECK ON BANK.** Where the deceased in his last sickness gave his friend a check upon his bank in another town for nearly all of his estate, with the understanding that the gift was to be revoked in case of his recovery, and directed that the same be mailed to the bank, the same constitutes a valid gift *mortis causa* although owing to a misdelivery the check did not reach the bank until after the death of the donor, especially where there is no controversy with creditors or subsequent donees or assigns. *Phinney v. State*..... 236
2. **SAME—CONSTRUCTIVE DELIVERY—ASSIGNMENT OF FUNDS IN BANK—INTENT.** In such a case, the fact that a check on a bank does not ordinarily constitute an assignment of the fund does not prevent the same from being constructive delivery, as the subject of the gift was not available, and great latitude ought to be given to carry out the intent of the donor, where there is no contest with creditors. *Id.*..... 236
3. **GIFTS—EVIDENCE OF INTENTION—SUFFICIENCY—FINDINGS WHEN SUSTAINED.** Findings of the trial court that the transfer of certain bonds and securities from the decedent to his niece was intended as a gift, are sustained by the evidence where it appears that he earned large sums of money, and gave liberally to all his relatives, that he had conceived a great attachment for his niece, to whom he gave preference in every way, that he constantly wrote speaking of the securities as her own, and never required any accounting, either of the principal or the proceeds. *Walker v. Hargear* 672

GUARANTY:

See **INDEMNITY.**

Of note, on negotiation for value. See **BILLS AND NOTES, 1-3.**

GUARDIAN AND WARD:

1. **INFANTS—APPOINTMENT OF GUARDIAN—TEMPORARY GUARDIAN TO COLLECT ESTATE—WHEN NECESSARY.** Where, upon conflicting applications for the appointment of a general guardian of a minor, aged eight years, who is an orphan, having an estate of \$7,000 consisting of the amount due on policies of life insurance, the court appoints a suitable and responsible person, resident in this state, to act as the general guardian, it is error to appoint, without any application therefor, a temporary guardian for the purpose of collecting the amount due upon the insurance policies, no necessity appearing for such appointment, as the necessary result

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would be a waste of the estate in the payment of fees. *Reed v. Brown*.....130

HIGHWAYS:

See MUNICIPAL CORPORATIONS, 3-5.

Accidents at railroad crossings. See RAILROADS, 3-6.

Private ways by prescription. See ADVERSE POSSESSION, 3-6.

HUSBAND AND WIFE:

See DIVORCE.

Finding as to community property. See ADVERSE POSSESSION, 2.

Rights of survivor. See EXECUTORS AND ADMINISTRATORS, 4, 5.

Wife necessary party to foreclosure of lien on community property. See MECHANIC'S LIENS, 1-3.

1. COMMUNITY PROPERTY—LIENS—FORECLOSURE—WIFE NECESSARY PARTY. The wife is a necessary party to an action brought by a city to foreclose a local assessment lien upon community real estate. *McNair v. Ingebrigtsen*..... 186
2. SAME—QUIETING TITLE—ACTION TO SET ASIDE FORECLOSURE SALE—PARTIES—COMPLAINT—SUFFICIENCY. The complaint in an action to remove the cloud of a local assessment foreclosure sale and deed is insufficient where it appears that the property was community property and that the wife was not made a party to the foreclosure; and neither the hardship of requiring a city to name the wife, where the record title stands in the name of the husband and the parties are nonresidents, nor the fact that the wife has filed no community property claim, can be urged where the complaint fails to show nonresidence, and alleges that the community character of the land was known to the city. *Id.*..... 186
3. COMMUNITY PROPERTY—LIABILITY—JUDGMENT—CONFORMITY TO VERDICT—ORAL GUARANTY OF HUSBAND—VERDICT AGAINST HUSBAND—FAILURE TO FIND LIABILITY OF COMMUNITY. In an action against a husband and wife upon the oral guaranty of the husband, made by him upon transferring a note for value received, in which action recovery is sought against the husband personally and against the property of the community, and the only question submitted to the jury was the personal liability of the husband, upon which they returned a verdict against the husband without passing upon the community liability, it is error to enter judgment upon the verdict against the community composed of the husband and wife, since such judgment does not conform to the verdict, as required by Bal. Code § 5115. *Swenson v. Stoltz*...318

IDEM SONANS:

See **CRIMINAL LAW**, 15.

IDENTITY:

Evidence of. See **CRIMINAL LAW**, 6.

INDEMNITY:

Application of payment. See **PRINCIPAL AND SURETY**, 1.

1. **INDEMNITY—EMPLOYEE'S LIABILITY INSURANCE—POLICY REQUIRING IMMEDIATE NOTICE OF ACCIDENT—DELAY—INSUFFICIENT EXCUSE.** Where a policy of insurance indemnifying an employer against liability of servants provides for immediate notice of the accident, a delay of eight months in giving the notice vitiates the policy, and the delay is not excused by the fact that one of the assured parties did not know of the accident, and the other did not know of the existence of the policy. *Deer Trail, etc. Min. Co. v. Maryland Casualty Co.*..... 46
2. **SAME—WAIVER OF NOTICE OF ACCIDENT—EVIDENCE OF WAIVER—SUFFICIENCY.** Waiver of a provision in an employer's liability policy of insurance requiring immediate notice of the accident is not shown by evidence to the effect that the attorneys for the assured called on the general agents of the company eight months after the accident, and in answer to inquiries stated that no notice had been given because they had no previous notice of the accident (one of the assured having had notice of the accident but not of the policy), and that thereupon the agents stated that, if so, notice would have been impossible, and that notice must be furnished as soon as possible, that a time was mentioned, which the agents said would be soon enough, and later furnished blanks for the purpose, which were filled up and delivered to the agents. *Id.*.....46
3. **MASTER AND SERVANT—NEGLIGENCE—INDEMNITY—FACT THAT DEFENDANT CARRIES ACCIDENT INSURANCE—TRIAL—OBJECTIONS—SUFFICIENCY.** In an action against an employer for personal injuries, where it is evident that the purport of questions asked by the plaintiff's counsel was to get before the jury the fact that the defendant was indemnified against liability by carrying employer's liability insurance, the case will be reversed, although defendant's first objection to such questions specified no grounds and the second objection made was sustained. *Iverson v. McDonnell.*.....73
4. **NEGLIGENCE—GUARANTY—FACT OF INSURANCE AGAINST LOSS—EVIDENCE INCIDENTALLY DISCLOSED.** Upon the proper cross-exam-

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ination of a witness for defendant in a personal injury case, it is not reversible error that testimony was incidentally disclosed tending to show insurance against the loss, where no motion was made to withdraw the testimony, or admonish the jury not to consider it, and the respondent did not intend to disclose the fact, and was in no way to blame therefor. *Edwards v. Burke*....107

5. INDEMNITY—BUILDING CONTRACT—ACTION ON BOND—ACCRUAL—DATE OF FIRST BREACH—DELAY IN COMPLETION OF BUILDING. Where an indemnity bond, guaranteeing a building contract, provided that actions thereon must be instituted within six months after the first breach of the contract, and the owner accepted the building after delay in its completion, the surety cannot claim that the right of action on the bond was barred six months after the time specified in the contract for the completion of the building, since the surety cannot complain of waiver of any breach of the contract by the owner's acceptance of the building, when such waiver did not operate to the prejudice of the surety. *Ovington v. Aetna Indemnity Co.*.....473
6. SAME—LIMITATION OF ACTIONS. An action upon an indemnity bond guaranteeing a building contract, which required suit to be brought within six months of the first breach of the contract, is commenced in time if within six months of the time the building was to be completed, and within six months of the plaintiff's knowledge of any breach of the contract. *Henry v. Aetna Indemnity Co.*.....553
7. INDEMNITY—BOND GUARANTEEING BUILDING CONTRACT—NOTICE OF ACTS INVOLVING LOSS—WAIVER. Where an indemnity bond guaranteeing a building contract stipulated for notice to the surety of acts which "may involve loss," the failure of the owner to notify the surety that the contractor had failed to meet payments for labor and material will not void the bond, where the agents of the surety gave the owner the first notice thereof, and requested payments thereafter to be made through them, and where the general agents had notice of this course, since the notice is thereby waived. *Id.*..... 553
8. INDEMNITY—INSURANCE—BOND GUARANTEEING BUILDING CONTRACT—NOTICE OF ACTS INVOLVING LOSS—CONSTRUCTION—RELEASE OF SURETY. An indemnity bond or policy guaranteeing the performance of a building contract, which stipulates that notice must be given the surety of any act on the part of the contractor which may involve a loss, does not require the giving of notice that the contractor has failed to pay the employees, and a

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notice given as soon as the claimants sought to make their claim charges against the property is in time to prevent the discharge of the surety. *Ovington v. Aetna Indemnity Co.*.....473

9. SAME—ALTERATION IN CONTRACT INCREASING COST OF BUILDING—RELEASE OF SURETY. The surety in an indemnity bond guaranteeing a building contract is not released by reason of the fact that changes were made in the plans as the work progressed, increasing the cost of the building, where the building contract provided that such changes might be made. *Id.*.....473
10. SAME—JUDGMENT AGAINST PRINCIPAL—NOTICE TO THE SURETY TO DEFEND—ESTOPPEL. Where a surety company guaranteed, by the bond, the faithful performance of a building contract in which the contractor agreed to furnish all the material, and is given due notice to defend an action commenced by materialmen to foreclose a lien for material furnished to the contractors, a judgment obtained in good faith against the contractors, the principals in the bond, establishing the claim and foreclosing the lien, is binding upon the surety, to the same extent that it binds the contractors, and, in an action on the bond, estops the surety company from claiming that there was no breach of the contract. *Henry v. Aetna Indemnity Co.*.....553
11. INDEMNITY—BOND UNDER VOID ACT—COMMON LAW OBLIGATION—PRIVITY. Where an indemnity bond is given by a railroad contractor, under the provisions of an act void for want of sufficient title, conditioned for the payment for provisions furnished in the prosecution of the work, the surety is not liable to the person furnishing the materials as upon a common law obligation, since there was no privity of contract between them. *Armour & Co. v. Western Const. Co.*.....529

INDIANS:

Contracts of, validity. See REPLEVIN, 2.

1. INDIANS—CONTRACTS—LEASES—APPROVAL BY INDIAN DEPARTMENT. A lease of lands in the Cœur d'Alene Indian reservation from an Indian to a white man is void unless approved by the Indian department. *Coey v. Low*.....10

INFANTS:

See GUARDIAN AND WARD.

Custody and support on divorce of parents. See DIVORCE, 4.

INJUNCTION:

- Against breach of contract for sale of beer. See **RECEIVERS**, 1.
- Condemnation proceedings. See **EMINENT DOMAIN**, 4.
- Dissolution, affidavits, review. See **APPEAL AND ERROR**, 21.
- Dissolution, appealable when. See **APPEAL AND ERROR**, 4.
- To enforce contract to buy books. See **SCHOOLS AND SCHOOL DISTRICTS**, 12, 14, 15.

INSANE PERSONS:

- Suicide, defense to action for insurance. See **BENEFICIAL ASSOCIATIONS**, 1.

INSOLVENCY:

- Of banks. See **BANKS AND BANKING**, 1-4.
- Of bankrupt, finding of, conclusiveness. See **EXEMPTIONS**, 1.
- Of corporation. See **CORPORATIONS**, 1-7.
- Finding of, on dissolving injunction. See **APPEAL AND ERROR**, 4.

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- Duty of master to inspect appliances. See **MASTER AND SERVANT**, 3.

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- In actions for personal injuries. See **MASTER AND SERVANT**, 3-5.
- In civil actions. See **TRIAL**, 4-6.
- In criminal prosecutions. See **CRIMINAL LAW**, 20, 21.
- Harmless error in. See **APPEAL AND ERROR**, 34-36, 39-41.

INSURANCE:

- See **BENEFICIAL ASSOCIATIONS**.
- Employer's liability. See **INDEMNITY**.

1. **INSURANCE—CONDITIONS OF POLICY—CONSTRUCTION—WARRANTY AGAINST IDLENESS OF PLANT FOR MORE THAN THIRTY DAYS—EVIDENCE—SUFFICIENCY.** A clause in a policy of fire insurance upon a shingle mill providing that the policy should be void if the property should be idle or shut down for more than thirty days, refers to the stopping of the machinery by which the manufacture is effected; and the policy is vitiated where no shingles are cut and no steam is generated in the boilers for more than thirty days, notwithstanding the fact that shingles are placed in the dry kiln to air dry and are shipped therefrom, or that bolts were brought down ready for manufacture during said period, and such acts do not constitute partial operation of the property. *Brechm Lumber Co. v. Svea Ins. Co.*..... 520

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2. **SAME—INCREASE OF RISK.** Where, in answer to questions, an application for insurance upon a steam shingle mill enumerated, as the facilities for extinguishing fires, certain apparatus that could be operated only when fires were under the boilers and steam was up, a clause, conspicuously attached to the policy, providing that the insurance should be void if the property was idle or shut down for more than thirty days, is a reasonable provision to be enforced as any other contract, and, with evidence of idleness, supports a defense that the risk had been increased without the company's consent. *Id.*.....520
3. **INSURANCE—SEPARATE VALUATION CLAUSES—DIVISIBILITY OF CONTRACT—BREACH OF CONDITIONS AFFECTING ENTIRE RISK.** Where, in violation of a clause that the property shall not be shut down, the omission to keep steam in the boilers of a steam shingle mill rendered useless the fire apparatus mentioned in the application, and affected the whole risk, the contract can not be considered divisible by reason of the fact of separate valuation clauses and separate items of insurance upon the mill, the engines and boilers, machinery, dry kiln and pipes, and stock on hand, all in proximity thereto and connected therewith, and if the policy is void as to part it is void as to the whole. *Id.*... 520
4. **INSURANCE—APPORTIONMENT ON SPECIFIC ARTICLES—BREACH OF POLICY AS TO PART—FALSE STATEMENTS—FRAUD.** The mere fact that a policy of fire insurance on a hotel building and contents specifies \$200 insurance on a piano when there was no piano in the building, does not vitiate the policy as to the other items of the insurance, in the absence of all proof as to how the piano was included, since fraud will not be presumed, and a breach of the policy as to one class of property does not avoid the policy as to the other parts in the absence of fraud, act condemned by public policy, or increase of risk. *Herzog v. Palatine Insurance Co.*.....611
5. **SAME—MISTAKE.** That the piano was included by mistake and so there was no meeting of the minds of the parties, does not affect the insurance on the building as to which there was no mistake. *Id.* 611
6. **SAME—PROOF OF LOSS—FALSE SWEARING.** False swearing in the proof of loss in order to avoid a policy must relate to material matters, and the jury's verdict thereon, when supported by testimony, is conclusive. *Id.*..... 611
7. **INSURANCE—INTEREST OF INSURED—MORTGAGEE OF BUILDING—INSURANCE ON CONTENTS—FAILURE OF PROOF AS TO INTEREST IN PERSONAL PROPERTY.** In an action brought by a mortgagee of a hotel

INSURANCE—CONTINUED.

building upon a policy of fire insurance made payable to him "as his interest may appear," and calling for \$2,000 on the building and \$300 on certain contents, there is a total failure of proof as to plaintiff's interest in the personal property, where his mortgage for \$2,500 was on the real estate only, and a judgment for \$2,300 will be reduced as excessive to the extent of \$300. *Herzog v. Palatine Insurance Co.*.....611

INTENT:

Criminal. See CRIMINAL LAW, 20, 21.

INTERPLEADER:

Appeal by intervenors. See APPEAL AND ERROR, 8.
Of attaching creditors, effect. See CORPORATIONS, 4.

1. INTERPLEADER—ASSIGNMENT OF DRAFTS—DEFENSES—PREVIOUS CONTRACT—EVIDENCE—ADMISSIBILITY. In an action of interpleader to determine conflicting claims to money collected by a bank, waged on the theory that the same had been assigned in payment of the amount due upon a contract, evidence in relation to the contract, which is not in dispute, is inadmissible, since the claim for recovery is based on the assignment and not upon the contract. *Zilke v. Woodley*..... 84
2. INTERVENTION—PARTIES INTERESTED IN LITIGATION—PATRON OF SCHOOL INTERVENING IN SUIT AGAINST DISTRICT BROUGHT BY PUBLISHER OF TEXT BOOKS. A taxpayer in a school district whose children attend the school has no such interest in the matter in litigation as entitles him to intervene in an action brought against the district by the publisher of text books under a contract with the state board, which action is based on the publisher's contract to supply the books needed and seeks to enjoin the school district from deviating from the course of study prescribed by the state board of education. *Westland Publishing Co. v. Royal*.....399

INTERROGATORIES:

Answer to, sufficiency. See DISCOVERY, 1.

INTOXICATION:

On charge of disorderly conduct, materiality. See MALICIOUS PROSECUTION, 6.

IRRIGATION:

- Condemnation of property for public use. See **EMINENT DOMAIN**, 1, 2.
- Title of condemnation act. See **STATUTES**, 1.

ISSUES:

- In civil actions. See **PLEADING**, 2, 4.

JEOPARDY:

- Former jeopardy. See **CRIMINAL LAW**, 18.

JUDGES:

- Comment on facts. See **APPEAL AND ERROR**, 40; **TRIAL**, 4.

JUDGMENT:

- On appeal. See **APPEAL AND ERROR**, 49-52.
 - Bar, by notice to surety to defend action. See **INDEMNITY**, 10.
 - Entry of, date, finality. See **APPEAL AND ERROR**, 11.
 - Ex parte orders. See **EXECUTORS AND ADMINISTRATORS** 2, 3.
 - In firm name, harmless error. See **APPEAL AND ERROR**, 32.
 - Res adjudicata, findings of referee in bankruptcy. See **EXEMPTIONS**, 1.
 - On tax foreclosure, city barred although not a party. See **TAXATION**, 2.
 - Vacation of decree of divorce. See **DIVORCE**, 5.
 - Vacation of, when final. See **APPEAL AND ERROR**, 3.
 - Vacation of, not reviewed when. See **APPEAL AND ERROR**, 18.
1. **JUDGMENT—VACATION—RECITALS AS TO SUMMONS AND JURISDICTION—MOTION TO VACATE.** Where a judgment contains recitals showing due service of process, with other findings sufficient to show jurisdiction, the presumption of jurisdiction is not overcome by defects in the record, and hence an unsupported motion to vacate the judgment, based upon the record in the cause, is demurrable. *Nolan v. Arnot*..... 101
 2. **JUDGMENT—VACATION ON PETITION—FINDINGS OUTSIDE THE ISSUES—REVIEW.** Where a judgment is vacated on petition, the fact that the trial was not confined to the issues, as required by statute, and that findings were made outside thereof, does not require a reversal, where other findings within the issues support the judgment. *State ex rel. Weidert v. Superior Ct.*.....81

JURISDICTION:

See **PROHIBITION**, 1-3.

Attachment, status of case upon issuance. See **APPEAL AND ERROR**, 26.

Proceeding in rem. See **TAXATION**, 2.

Process to support. See **PROCESS**, 1.

JURY:

Assessment of damages in condemnation proceedings. See **EMINENT DOMAIN**, 1, 2.

Instructions in civil actions. See **TRIAL**, 4-6.

Instructions in criminal prosecutions. See **CRIMINAL LAW**, 20, 21.

1. **TRIAL—BY JURY—FAILING TO DEMAND WHEN SET FOR TRIAL—DISCRETION.** It is discretionary to award a jury trial although the same was not demanded when the case was set for trial in the manner required by Laws 1903, p. 50, and error cannot be predicated thereon. *Knapp v. Order of Pendo*..... 601
2. **JURY—TRIAL—DEMAND FOR JURY—WAIVER.** A demand for a jury trial is waived where the trial is transferred to another judge, on the theory that the cause is of an equitable nature, with the suggestion that the party may save his right to a jury trial by a motion to remand, and no objection or motion to remand is made, and the trial is had without calling the trial judge's attention to the demand. *Zilke v. Woodley*..... 84
3. **JURORS—CHALLENGE.** In an action against a city, a challenge to a juror for implied bias solely because he had performed clerical work for the city is properly denied. *Swope v. Seattle*.....113
4. **RAPE—JURORS—CHALLENGE FOR CAUSE—SITTING ON SIMILAR TRIAL.** In a prosecution for rape committed on the person of a child under the age of consent, a juror who has sat upon a trial wherein another person had been convicted of a similar offense, committed upon the same prosecuting witness, is not disqualified, where the crimes were separate and distinct and committed at different times; and a challenge for cause is properly overruled. *State v. Van Waters*.....358
5. **JURORS—COMPETENCY—CHALLENGE FOR CAUSE—DISQUALIFIED BY OPINIONS.** Jurors who have formed opinions regarding the guilt or innocence of the accused, which it would take evidence to remove, are disqualified, notwithstanding that they can, or believe they can, disregard such opinions and try the case according to the law and evidence, and overruling challenges for cause to such jurors deprives the accused of a trial before a fair and impartial jury. *State v. Riley*.....441

JUSTICES OF THE PEACE:

Change of venue, dockets. See **MALICIOUS PROSECUTION**, 4.

KNOWLEDGE:

As affecting assumption of risks by servant. See **MASTER AND SERVANT**, 5, 7.

LABOR:

Eight hour day. See **CONSTITUTIONAL LAW**, 7.

LACHES:

Of consignee in removing goods. See **CARRIERS**, 5.

LANDLORD AND TENANT:

Oral leases. See **FRAUDS, STATUTE OF**, 1-7.

1. **LEASE—REAL OR PERSONAL PROPERTY—BUILDING TO BE MOVED TO CERTAIN LOT.** An oral lease of a building, which was to take effect only when the building has been moved to a certain lot, can not be sustained as a lease of personal property, as it had reference to the building after it should become a part of the realty. *Richards v. Redelsheimer*.....325

LANDS:

See **PUBLIC LANDS**.

LARCENY:

See **CRIMINAL LAW**, 4, 8, 9.

LAST CLEAR CHANCE:

See **RAILROADS**, 8.

LEASES:

See **LANDLORD AND TENANT**.

By Indians. See **INDIANS**, 1.

Oral, validity. See **FRAUDS, STATUTE OF**, 1-7.

LEGISLATIVE POWER:

See **CONSTITUTIONAL LAW**, 1-7.

LICENSES:

Injuries to licensees. See **RAILROADS**, 1, 2, 7, 8.

LIENS:

See **MECHANICS' LIENS**.

For labor and materials, title of act. See **STATUTES**, 3.

Of livery stable keeper, property in. See **CRIMINAL LAW**, 1.

Loggers' liens. See **LOGS AND LOGGING**, 1-4.

Tax lien. See **TAXATION**, 1, 2.

LIGHT AND POWER PLANTS:

Franchise for, power of city to grant. See **MUNICIPAL CORPORATIONS**, 1.

LIMITATION OF ACTIONS:

See **ADVERSE POSSESSION**.

Accrual, against surety. See **PRINCIPAL AND SURETY**, 2.

By stipulation of bond, date of first breach. See **INDEMNITY**, 5, 6.

Bringing in new party by amendment. See **MECHANICS' LIENS**, 3.

Payment on note to toll statute, presumption. See **PLEADINGS**, 1.

On statutory liability of bank stockholders to creditors, when accrues. See **BANKS AND BANKING**, 1-4.

Tolling statute, delay of receiver. See **BANKS AND BANKING**, 3.

1. **LIMITATIONS OF ACTIONS—RELIEF ON THE GROUND OF FRAUD—DISCOVERY OF FRAUD—COMPLAINT—SUFFICIENCY.** An action by the holder of part of the bonds of a street railway corporation, seeking an accounting for certain property alleged to have been fraudulently abandoned to foreclosure sale, under a fraudulent reorganization scheme arranged by the defendant companies and their mortgagees, and the other bondholders, whereby the plaintiff, who was absent in Central America, was to be excluded from such reorganization by effecting the same before he could have actual knowledge thereof, is barred by the statute of limitations when it is not commenced until more than three years after the decree of foreclosure whereby the property passed into other hands, where the plaintiff admits actual knowledge of the foreclosure decree; and the allegation that he did not have knowledge of the reorganization scheme or of the fraudulent plan to exclude him therefrom and that the same were not discovered within the said statutory period, will not evade the effect of the averments showing actual notice of the real fraud, which consisted in abandoning the defenses and confessing the decree of foreclosure; since the plaintiff is not seeking participation in the reorganization, but an accounting in property sold to his prejudice, and to his knowledge for more than the statutory period. *Griffith v. Seattle Consolidated Street Railway Co.*..... 637

LIVERY STABLE KEEPERS:

Liens of, property in. See **CRIMINAL LAW**, 1.

LIVE STOCK:

Injuries from operation of railroads. See **RAILROADS**, 3-6.

LOGS AND LOGGING:

Contract to secure creditors of logger, construction. See **CONTRACTS**, 2-4.

Safe method of hauling logs. See **MASTER AND SERVANT**, 6.

Use of stream for logging purposes. See **WATERS**, 1, 2.

1. **LOGS AND LOGGING—LIENS FOR BOOMING—NOTICE—DESCRIPTION—SUFFICIENCY.** The notice of a lien upon saw logs, for boomage charges, identifies the logs and is sufficient, when the logs are described as being of a certain number, branded in a certain way, and at a certain place, and the notice complies literally with the form prescribed by statute. *Grays Harbor Boom Co. v. Lytle etc. Co.* 151
2. **SAME—FORECLOSURE OF LIEN—DESTRUCTION OF PART OF PROPERTY BEFORE SUIT—FORECLOSURE AS TO BALANCE.** An action to foreclose a lien on saw logs may be commenced after a portion of them have been made into lumber, and foreclosure may be decreed as to the existing portion. *Id.* 151
3. **SAME—JUDGMENT ESTABLISHING LIEN—MONEY IN COURT—IMPRESSING MONEY WITH LIEN—EQUITABLE POWERS OF COURT.** Where money has been withheld by the purchasers of saw logs to the extent of liens claimed thereon, and, upon an action's being commenced to foreclose the liens, the purchasers bring the money into court, it is within the equitable powers of the court to impress the lien upon the money and order the same paid in discharge of the liens that are established. *Id.* 151
4. **SAME—DESTRUCTION OF PROPERTY BEFORE TRIAL—PERSONAL JUDGMENT AGAINST OWNER WITHOUT FORECLOSURE—APPLICATION OF MONEY IN COURT.** In an action to foreclose a lien on saw logs where at the time of the trial the logs have been manufactured into lumber and their identity destroyed, the court can not order a foreclosure of the liens, but may enter judgment against the party liable for the amount due, and apply thereon any money in court impressed with the lien. *Id.* 151

MALICE:

See **MALICIOUS PROSECUTION**, 1, 2.

MALICIOUS PROSECUTION:

1. **MALICIOUS PROSECUTION—DEFENSES—MALICE—ADVICE OF COUNSEL.** In an action for malicious prosecution a nonsuit should not be granted on the ground that defendant instituted the same upon the advice of the magistrate, where the evidence merely showed that the magistrate stated that the charge was warranted if the facts could be substantiated. *Charlton v. Markland*..... 40
2. **SAME—LACK OF PROBABLE CAUSE—DISCHARGE FOR INSUFFICIENT PROOF.** In an action for malicious prosecution, plaintiff's discharge by the magistrate because of insufficient evidence, is prima facie proof of want of probable cause. *Id.*..... 40
3. **MALICIOUS PROSECUTION—DAMAGES—VERDICT NOT EXCESSIVE.** A verdict of \$600 in an action for malicious prosecution will not be disturbed as excessive where the plaintiff was an old man, was greatly humiliated, and lost much sleep, although he was under arrest less than one hour. *Id.*..... 40
4. **MALICIOUS PROSECUTION—DEFENSES—DISCHARGE—JURISDICTION OF JUSTICE OF THE PEACE—CHANGE OF VENUE—TRANSCRIPT OF DOCKET—EVIDENCE.** In an action for a malicious prosecution of a charge before a justice of the peace, where a change of venue was had to the next nearest justice, the transcript of the docket, showing plaintiff's discharge, is properly admitted in evidence, where sufficient appears to show that such justice had acquired jurisdiction of the case. *Kerstetter v. Thomas*..... 620
5. **SAME—COMPLAINT—SUFFICIENCY—OBJECTIONS FIRST MADE IN SUPREME COURT.** In an action for the malicious prosecution of a charge before a justice of the peace, where a change of venue is had to one who is admitted to be the next nearest justice, the complaint cannot be objected to for the first time in the supreme court on the ground that it did not set forth the facts showing the jurisdiction of the last justice, where the properly certified records of the justices show the transfer was regularly made, technical accuracy not being required. *Id.*..... 620
6. **MALICIOUS PROSECUTION—CHARGE OF DISORDERLY CONDUCT—DEFENSE OF INTOXICATION—EVIDENCE IN REBUTTAL.** In an action for the malicious prosecution and arrest of plaintiff upon a charge of disorderly conduct, it is not necessary for the plaintiff to prove that he was not intoxicated at the time of his alleged violation of the ordinance, and where the question of such intoxication is raised by the testimony of the defendant, it is not error to permit the plaintiff to rebut it. *Id.* 620

MANDAMUS:

To compel correction of statement of facts. See **APPEAL AND ERROR**, 17-21.

To compel judge to issue execution. See **EXECUTIONS**, 1.

To compel mayor to sign ordinance. See **MUNICIPAL CORPORATIONS**, 2.

To secure inspection of county records. See **RECORDS**, 2.

To secure supersedeas. See **APPEAL AND ERROR**, 15.

1. **MANDAMUS—DEMURRER—ISSUES OF FACT HOW RAISED.** After an application for a writ of mandate has been submitted to the supreme court upon a demurrer to the application, the defendants are not entitled, upon the overruling of the demurrer, to leave to answer, as issues of fact must be presented at the time of the hearing, which is final. *State ex rel. Jefferson County v. Hatch*.... 164
2. **MANDAMUS—APPEAL—JUDGMENT—EXECUTION—REFUSAL OF LOWER COURT TO CARRY OUT DIRECTIONS OF SUPREME COURT—ADEQUACY OF REMEDY BY APPEAL.** Mandamus lies to compel the judge of the superior court, who has quashed an execution for costs, directed by the supreme court on affirming a decision, to cause execution to issue therefor, since the remedy by appeal is neither speedy nor adequate to enforce the judgments of the supreme court after an appeal is once decided. *Id.*..... 164
3. **MANDAMUS—PLEADINGS—REPLY.** It is not necessary, under the code, to reply to a return or answer in mandamus, new matter being deemed denied. *State ex rel. Brown v. McQuade*..... 579
4. **MANDAMUS—WHEN LIES—SCHOOLS—COMPELLING SCHOOL BOARD TO ISSUE WARRANT FOR TEACHER'S SALARY.** Mandamus will lie upon the application of a school teacher to compel the board of school directors to issue a warrant for his salary, if anything is due under a contract providing that he was to be paid by a warrant drawn by the school board on the county treasurer, the remedy at law being inadequate, since it could only result in a judgment directing the issuing of a warrant. *Id.*..... 579
5. **SAME—MANDAMUS UNDER THE CODE.** The principle that the writ of mandamus issues only where the right thereto is clear has no application to the writ authorized by the code, and hence it may issue, although sought to enforce disputed claims, the procedure under the code having all the elements of a civil action. *Id.*..... 579

MANDATE:

To lower court on decision on appeal. See **APPEAL AND ERROR**, 51, 52.

MARRIAGE:

Promise of, unnecessary in seduction. See **CRIMINAL LAW**, 4.

MASTER AND SERVANT:

Admissions of servant not used against master. See **EVIDENCE**, 1.
Employer's liability, fact of insurance against. See **INDEMNITY**, 3, 4.

Knowledge of servant as to vicious habit of horses. See **ANIMALS**, 2.

Promise to repair, amendment of pleadings, instructions. See **TRIAL**, 6.

1. **MASTER AND SERVANT—NEGLIGENCE—RAILROAD WRECK—PROXIMATE CAUSE—LOGGING TRAIN COLLIDING WITH COWS—QUESTION FOR JURY.** In an action for personal injuries sustained in a collision of a logging train with cows on the track, upon rounding a curve at the end of a down grade, the questions of plaintiff's contributory negligence and assumption of the risks in riding on the engine, and whether the presence of the cows was the proximate cause of the injury, are for the jury, where the evidence was conflicting as to the competency of the engineer, the sufficiency of the equipment, and as to the negligence of the trainmen in permitting the train to get beyond their control. *Cook v. Stimson Mill Co.*..... 36
2. **MASTER AND SERVANT—NEGLIGENCE—FALL OF ELEVATOR—NEGLIGENCE OF FELLOW SERVANT—EVIDENCE—SUFFICIENCY.** In an action for injuries sustained by an elevator boy through the starting of the elevator by the janitor after the completion of repairs, there is no evidence of negligence by the janitor requiring the submission of instructions relating to fellow servants, where the janitor testifies that, after the repairs were completed, he untied the lever, which suddenly flew over before he could stop it, and the only other evidence tending to show neglect of the janitor being that the accident might have been caused by suddenly throwing over the lever instead of starting it slowly. *Young v. O'Brien*..... 570
3. **SAME—FALL OF ELEVATOR—INSPECTION—FAILURE OF SAFETY CLUTCHES TO OPERATE—CAUSE OF ACCIDENT—INSTRUCTIONS.** In an action for injuries caused by the fall of an elevator, it is not error to refuse to instruct that the fact that safety clutches did not work was not proof of negligence unless it appeared that an inspection would have disclosed their failure to operate, where there was no express request for such instruction, and the jury

MASTER AND SERVANT—CONTINUED.

were properly instructed as to the duty of inspection, and that they could not infer that the machinery was defective from the mere fact of an accident, but must find a defect which was the proximate cause of the injury. *Id.*..... 570

4. SAME—SCOPE OF EMPLOYMENT—INSTRUCTIONS. It is not error to refuse an instruction to the effect that if the plaintiff, an elevator boy, injured in the fall of an elevator, was outside of the scope of his employment at the time of the accident, he could not recover, where it appears that he entered the elevator to take charge of it after the completion of repairs, according to his usual custom, and where the court instructed that, in order to find for the plaintiff, the jury must find that he was in the elevator in the course of his employment. *Id.*..... 570

5. SAME—ASSUMPTION OF RISKS—INSTRUCTIONS. Instructions upon the assumption of risks by a servant are not objectionable as being limited to risks known to him at the time of entering the employment, when they plainly state that the servant assumes the risks of dangers known to him. *Id.*..... 570

6. MASTER AND SERVANT—NEGLIGENCE—FAILURE TO PROVIDE SAFE METHOD OF DOING BUSINESS—STARTING LOGGING ENGINE WITHOUT WARNING—COMPLAINT—SUFFICIENCY. In an action for personal injuries sustained through the negligent starting of a logging engine without giving warning, the complaint is sufficient, as against a general demurrer, where it is alleged that the defendant's donkey engine used for dragging logs with a cable was beyond the view of the men attaching the logs, that the defendant negligently failed to supply any appliance by which the engineer could signal to the men that he was about to start the engine, that it was customary and the defendant's adopted method of doing business not to start the engine until the men had signaled to the engineer, and that the engineer negligently started the engine without waiting for such signal, or giving the plaintiff any notice, whereby the plaintiff, who was attaching the logs in his regular line of duty, was injured. *Conine v. Olympia Logging Co.*..... 345

7. MASTER AND SERVANT—RAILROADS—NEGLIGENCE—INJURY TO BRAKEMAN THROUGH FALL FROM CAR—UNUSUAL CONSTRUCTION OF FOREIGN CAR—ASSUMPTION OF RISK—NONSUIT—EVIDENCE—SUFFICIENCY. In an action against a railroad company for personal injuries sustained by a brakeman in falling from a foreign car received for transportation, through the fact, as claimed, that the hand-grab on top of the car was within three inches from the

MASTER AND SERVANT—CONTINUED.

end of the car instead of further back, as usual, and that the defendant negligently failed to notify the plaintiff of such fact, it is error to refuse a nonsuit where it appears that the plaintiff was an experienced brakeman, and had seen and knew of the receipt of cars somewhat similarly constructed, and where the position of the hand-grab was apparent as soon as he reached the top of the car, and he did not fall at that time, but in attempting to rise, the hand-grab being of no assistance in rising, and there being nothing out of repair about the car; since he assumed the risk upon seeing the situation, which was equivalent to notice, and the company's duty to inspect foreign cars for defects, or unusual construction which is not open and apparent, does not establish any negligence under the circumstances. *Woods v. Northern Pac. R. Co.*..... 653

MECHANICS' LIEN:

Title of act. See STATUTES, 3.

1. **MECHANICS' LIENS—PARTIES—COMMUNITY PROPERTY—FORECLOSURE—WIFE OF OWNER NECESSARY PARTY.** The wife is a necessary party to an action to foreclose a mechanics' lien upon community property. *Northwest Bridge Co. v. Tacoma Shipbldg. Co.*..... 333
2. **MECHANICS' LIENS—INTEREST OF OWNER LESS THAN FREEHOLD.** Under Bal. Code § 5901, where premises are held under a contract of sale, duly recorded, a mechanics' lien for improvements contracted for by the vendee is confined to the interest of the vendee in the land, notwithstanding the fact that the vendor, in the contract of sale, requires the construction of the improvement, since the contractor deals with the vendee at his peril, and the lien is lost in case of forfeiture of the vendee's interest. *Id.*..... 333
3. **SAME—AMENDMENT BRINGING IN PARTY—EXPIRATION OF TIME LIMITED FOR FORECLOSURE.** The interests of a wife or other party in real estate can not be subjected to a mechanics' lien when not originally made a party to the foreclosure suit and not brought in by amendment until after the expiration of the time limited for commencing action. *Id.*..... 333
4. **MECHANICS' LIEN—NOTICE—SUFFICIENCY—AGENT OF AN AGENT.** A notice that the materials were furnished and the work performed at the request of the S company, as agent for B, as agent for the owners, is not sufficient under Bal. Code § 5900 requiring it to have been done at the request of the agent of the owners. *Id.* 333

MISTAKE:

- As to boundary lines. See ADVERSE POSSESSION, 1.
- In application. See INSURANCE, 5.

MODIFICATION:

- Of decree in divorce. See DIVORCE, 3, 4.
- Of judgment or order on appeal. See APPEAL AND ERROR, 50.

MONEY IN COURT:

- See INTERPLEADER, 1.
- Impressed with lien. See LOGS AND LOGGING, 3.

MONUMENTS:

- See BOUNDARIES, 1, 2.

MORTGAGES:

- Assumption, breach of, damages. See COVENANTS, 1-2.

MOTIONS:

- Dismissal or nonsuit on trial. See TRIAL, 1-3.

MUNICIPAL CORPORATIONS:

See COUNTIES; SCHOOLS AND SCHOOL DISTRICTS.

- Condemnation for local improvements, practice, damages. See EMINENT DOMAIN, 4-6.

Eight hour day on public works. See CONSTITUTIONAL LAW, 7

Election to annex territory, review, remedy by appeal. See PROHIBITION, 1-3.

Local improvement liens, cut off by general taxes. See TAXATION, 2.

1. MUNICIPAL CORPORATIONS—POWERS—GRANTING FRANCHISES FOR LIGHT PLANTS. A city of the fourth class is authorized to pass an ordinance granting an electric light and power franchise; even though a previous franchise which was not exclusive had been granted to another party. *State ex rel. Prosser Falls Land and Irr. Co. v. Taylor*..... 607
2. MUNICIPAL CORPORATIONS—CITY OF FOURTH CLASS—ORDINANCES—MAYOR'S DUTY TO SIGN—VETO—MANDAMUS, WHEN LIES. The charter of cities of the fourth class gives the mayor no veto or discretionary power, with reference to signing ordinances, and under Bal. Code, § 1012, providing that every ordinance of a city of the fourth class shall be signed by the mayor, mandamus lies to compel the mayor to sign an ordinance duly passed by the council, since his duties depend entirely upon the charter provisions. *Id.* 607

MUNICIPAL CORPORATIONS—CONTINUED.

3. **MUNICIPAL CORPORATIONS — STREETS—NEGLIGENCE—PLEADINGS—EVIDENCE—VARIANCE—PERMIT TO REPAIR WALK.** In an action for personal injuries sustained in a fall through a trap door in the sidewalk, in which the city is alleged to have granted a permit to repair the sidewalk and trap door, it is not a variance to prove a permit to construct a brick walk at the same place. *McClammy v. Spokane*..... 339
4. **SAME—LIABILITY OF CITY—NEGLIGENCE OF PRIVATE CONTRACTOR.** Where a city grants a permit to repair a sidewalk, it is charged with notice of the work and with the duty to see that the work is properly conducted. *Id.*..... 339
5. **SAME—DEFECTIVE SIDEWALK—EVIDENCE — SUFFICIENCY — QUESTION FOR JURY.** In an action for personal injuries sustained in a fall through a trap door in a sidewalk, the questions of the negligence of the city, and the contributory negligence of the plaintiff, are for the jury where it appears that the city granted a permit for a new walk in front of a lodging house, that it was necessary to cross the trap door to enter the house, that, while the repairs were in progress, and the trap door appeared as it always had, and there was no barrier, it gave way with plaintiff, she having but recently crossed it, and having been informed by the man in charge of the work that it was safe; and the fact that the plaintiff could have gained access to the building by a back stairway, which was old and unsafe, does not alter the case. *Id.*..... 339

MUTUAL BENEFIT SOCIETIES:

See **BENEFICIAL ASSOCIATIONS.**

NAVIGABLE WATERS:

See **WATERS AND WATER COURSES.**

NEGLIGENCE:

Adjoining owner. See **FIRES, 1.**

Contributory negligence of servant as question for jury. See

MASTER AND SERVANT, 1.

Employers. See **MASTER AND SERVANT, 1-7.**

Fall of elevator. See **CARRIERS, 1.**

Of licensee. See **RAILROADS, 2, 7.**

Owner of vicious team. See **ANIMALS, 1-3.**

Private crossing. See **RAILROADS, 3-6.**

Sidewalks. See **MUNICIPAL CORPORATIONS, 2-5.**

NEGLIGENCE—CONTINUED.

1. **NEGLIGENCE—DANGEROUS PREMISES—FALL DOWN A STAIRWAY IN A STORE—CONTRIBUTORY NEGLIGENCE—DIRECTED VERDICT.** In an action for personal injuries sustained by a customer in a store in falling down a stairway, a verdict for the defendants is properly directed when it appears from the plaintiff's evidence that she fell down the entrance of an ordinary stairway, which was protected on all sides except the entrance, and which was not in the main aisle of the store, that it was light and within twenty feet of windows, and there were lights in the basement, and that plaintiff was wearing darkened glasses to protect her eyes from the light, and could have seen the stairway if she had looked down. *Dunn v. Kemp & Hebert*..... 183

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES.**

Gifts of. See **GIFTS, 1, 2.**

NEW TRIAL:

1. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.** A new trial on the ground of newly discovered evidence is properly denied where the affidavits fail to show diligence to obtain the suggested evidence, and which is cumulative or of a disputed character. *Thayer v. Spokane County*..... 63

NOTES:

Promissory notes. See **BILLS AND NOTES.**

NOTICE:

Of action or process. See **PROCESS, 1.**

Of acts involving loss. See **INDEMNITY, 7, 8.**

Of appeal. See **APPEAL AND ERROR, 10, 11.**

Of defects in streets. See **MUNICIPAL CORPORATIONS, 4.**

Of forfeiture of contract to sell land. See **VENDOR AND PURCHASER, 1, 2.**

Of lien on logs. See **LOGS AND LOGGING, 1.**

Of liens. See **MECHANICS' LIENS, 4.**

Of loss, reasonableness. See **INDEMNITY, 1, 2.**

Of orders in probate. See **EXECUTORS AND ADMINISTRATORS, 2, 3.**

Of vicious propensity. See **ANIMALS, 2.**

NUISANCE:

Obstruction of stream. See **WATERS, 1, 2.**

OBJECTIONS:

- Necessity for purpose of review. See **APPEAL AND ERROR**, 5, 6.
- To pleadings. See **PLEADINGS**, 4.
- To evidence, sufficiency of. See **INDEMNITY**, 3.

OFFICERS:

- Corporate officers, fraud of. See **CORPORATIONS**, 5-7.
- County officers. See **COUNTIES**, 1.
- Of society, embezzlement. See **CRIMINAL LAW**, 3.
- School officers. See **SCHOOLS AND SCHOOL DISTRICTS**, 1-16.

OPINIONS:

- Of jurors. See **JURY**, 5.

ORAL CONTRACTS:

- See **FRAUDS, STATUTE OF**.

ORDERS:

- Review of appealable orders. See **APPEAL AND ERROR**.

ORDINANCES:

- Municipal ordinances, mayor's veto power. See **MUNICIPAL CORPORATIONS**, 1, 2.

PARENT AND CHILD:

- Custody of children on divorce. See **DIVORCE**, 4.

PARTIES:

- See **ASSIGNMENTS**, 1.
- See **HUSBAND AND WIFE**, 1-3.
- To appeal. See **APPEAL AND ERROR**, 8-10.
- City bound by foreclosure for unpaid taxes. See **TAXATION**, 2.
- Heirs, contesting allowance to administrator. See **EXECUTORS AND ADMINISTRATORS**, 1.
- Interpleading. See **INTERPLEADER**, 2.
- Judgment in firm name, harmless error. See **APPEAL AND ERROR**, 32.
- On note. See **BILLS AND NOTES**, 1-3.
- Receiver not aggrieved by discharge. See **CERTIORARI**, 1.
- Stockholders bound by determination of insolvency. See **CORPORATIONS**, 4.
- To contract, who may sue on bond. See **INDEMNITY**, 11.
- When may be brought in by amendment, limitations. See **MECHANICS' LIENS**, 3.
- Wife necessary party in foreclosure of lien on community property. See **MECHANICS' LIENS**, 1-3.

PASSENGERS:

See CARRIERS, 1-3.

PAYMENT:

As part performance. See FRAUDS, STATUTE OF, 10.

To toll statute of limitations, presumption. See PLEADINGS, 1.

Application of. See PRINCIPAL AND SURETY, 1.

Price of land sold. See VENDOR AND PURCHASER, 1, 2.

PERSONAL INJURIES:

See NEGLIGENCE, 1.

Excessive damages for. See DAMAGES, 2.

To employee. See MASTER AND SERVANT, 1-7.

To licensee. See RAILROADS, 1, 2, 4, 7, 8.

To passengers. See CARRIERS, 1-3.

To traveler on highways. See MUNICIPAL CORPORATIONS, 3-5.

PLEADING:

See MANDAMUS, 1, 3.

Amendment of answer. See CONVERSION, 1.

Amendment to conform to proof. See TRIAL, 6; SCHOOLS AND SCHOOL DISTRICTS, 8.

Answer to interrogatories, sufficiency. See DISCOVERY, 1.

Complaint, sufficiency. See MALICIOUS PROSECUTION, 5; MASTER AND SERVANT, 6; COVENANTS, 2.

Demurrer, review of ruling, amendment. See APPEAL AND ERROR, 25, 26.

Failure of proof. See INSURANCE, 6, 7.

Form of action, waiver. See QUIETING TITLE, 1-2.

Fraud, when must be pleaded as defense. See BENEFICIAL ASSOCIATIONS, 3.

Source of title, general denial. See REPLEVIN, 1.

Variance. See MUNICIPAL CORPORATIONS, 3; CRIMINAL LAW, 15.

Variance as to user, amendment. See ADVERSE POSSESSION, 4.

1. PLEADINGS—ACTION ON NOTE—TOLLING STATUTE OF LIMITATIONS—PAYMENTS—PRESUMED TO BE MADE BY OBLIGORS. A complaint in an action upon a promissory note is not demurrable because it does not affirmatively allege that the payments relied upon to toll the statute of limitations were made or authorized by the obligors on the note, since the spirit of the code requires that to be presumed from the allegation specifying payments, and the fact that the payments were made by a stranger can be raised by answer. *Gehres v. Orlowski*..... 156

PLEADING—CONTINUED.

2. PLEADING—ACTION ON CONTRACT OR FOR CONVERSION—COMPLAINT—PLEADING AND PROOF—NONSUIT. Where a complaint sets forth a contract whereby the defendant agreed to organize a corporation and deliver to plaintiff a certain number of shares of the stock in payment for a mining claim, and alleges that, after full performance by the plaintiff, the defendant refused to deliver the stock, but caused the shares to be issued to himself, and there is sufficient evidence that the defendant violated such contract by failing to deliver the stock, it is error to grant a nonsuit on the theory that the action was for a conversion of the stock, there having been no evidence that the defendant had received the shares himself; since, under the code, the complaint is but a plain statement of the facts, and it alleges a violation of the contract in the defendant's failure to make payment as agreed upon. *Grant v. Walsh*..... 190
3. PLEADINGS—AMENDMENT—SUPPLEMENTAL COMPLAINT. It is proper to allow the filing of a supplemental complaint to include a demand for monthly installments accruing to the plaintiff since the commencement of the action, one year before the trial was had. *Knapp v. Order of Pendo*..... 601
4. PLEADINGS—COMPLAINT—SUFFICIENCY—OBJECTION NOT MADE BELOW. Upon the review of an equitable case, where, after findings of fact are made, the lower court dismissed the action, the insufficiency of the complaint cannot be urged in support of the judgment for the first time in the supreme court, but its sufficiency will be tested by the facts shown in the record. *Mitchell v. Jordan*..... 645

POLICE POWER:

See CONSTITUTIONAL LAW, 1-6.

POSSESSION:

See ADVERSE POSSESSION.

PRACTICE:

See APPEAL AND ERROR; CONTINUANCE; CRIMINAL LAW; DISCOVERY; MANDAMUS; PLEADING.

Condemnation proceedings. See EMINENT DOMAIN, 5.

Judgment establishing lien. See LOGS AND LOGGING, 3, 4.

Nonsuit. See TRIAL, 1-3.

PREFERENCES:

By insolvent corporation. See CORPORATIONS, 1-7.

PRESCRIPTION:

Acquisition of rights. See ADVERSE POSSESSION, 3-6.

PRINCIPAL AND AGENT:

Agent of agent. See MECHANICS' LIENS, 4.

Admissions by agent. See EVIDENCE, 1.

Embezzlement by agent. See CRIMINAL LAW, 3.

PRINCIPAL AND SURETY:

See INDEMNITY.

Sureties as parties to appeal. See APPEAL AND ERROR, 10.

1. **PRINCIPAL AND SURETY—APPLICATION OF PAYMENTS—SCHOOL BUILDING CONTRACT—INDEMNITY—SURETY WHEN NOT BOUND BY APPLICATION.** Where a surety company guarantees the faithful performance of a school building contract, pursuant to the statute for the benefit of laborers and material men, and the contractor pays the money received from the school district to a party who furnished material for the building, and to whom the contractor was indebted, also, upon an older unsecured account, the surety is not bound by an application of the school money to the old account, but is entitled to have the same applied on the school contract in discharge of its liability. *Crane Co. v. Pacific Heat & Power Co.*..... 95
2. **PRINCIPAL AND SURETY—LIMITATION OF ACTIONS—ACCRUAL.** A cause of action against a surety accrues upon the default of the principal. *Bennett v. Thorne*..... 253
3. **PRINCIPAL AND SURETY—JOINT NOTE—CLAIM THAT JOINT MAKER WAS SURETY ONLY—EVIDENCE—SUFFICIENCY—NONSUIT.** In an action by the assignee of a joint maker of a note claimed to be a surety only and who paid the note in full, to recover of the co-maker, S, the amount so paid, there is no sufficient evidence of the suretyship to warrant a recovery where it merely appears that S received the money on depositing the note in a bank and that the plaintiff's assignor paid the note, especially after the lapse of twelve years after the transaction, and the death of plaintiff's assignor. *Bettinger v. Scully*..... 596

PRIORITIES:

Of taxes. See TAXATION, 1, 2.

PROCESS:

Recitals as to service. See JUDGMENTS, 1.

Service by publication. See GARNISHMENT, 1.

1. **PROCESS ATTACHMENT—SERVICE OF SUMMONS ON FOREIGN CORPORATION OUTSIDE OF STATE.** Where an action is commenced by

PROCESS—CONTINUED.

attaching the property of a foreign corporation, personal service of the summons and complaint upon the defendant outside of of the state, in lieu of publication, is all that is required under Bal. Code, § 4879. *Hunter v. Wenatchee Land Co.*..... 541

PROHIBITION:

Writ not granted in anticipation of error. See **APPEAL AND ERROR**, 52.

1. **PROHIBITION—WHEN LIES—JURISDICTION OF COURTS TO ENJOIN CANVASS OF ELECTION RETURNS—ADEQUACY OF REMEDY BY APPEAL.** Prohibition does not lie to prevent the superior court from taking jurisdiction of an action brought by a property owner to enjoin the officers of a city from canvassing the returns of a special election, held therein for the purpose of annexing plaintiff's property, on the grounds of non-compliance with the election laws, fraud, and the unconstitutionality of the act under which the election was held, since the court had jurisdiction of the action to determine such questions, and there is an adequate remedy by appeal. *State ex rel. West Seattle v. Superior Court.*..... 566
2. **SAME—EMERGENCY—DELAY IN COLLECTION OF TAXES.** Upon an application for a writ of prohibition sought by a city to prevent the superior court from taking jurisdiction of an action to enjoin the canvass of the returns of a special election held for the purpose of annexing territory, sufficient emergency to warrant the issuance of the writ is not shown by an affidavit to the effect that the collection of taxes will be delayed, since time alone does not affect the adequacy of an appeal. *Id.*..... 566
3. **SAME—REMOTE DAMAGES.** In such a case, neither is an emergency shown by the fact that contemplated street railway construction by the city would probably be done upon better terms now than later, since that is too vague and speculative. *Id.*..... 566

PROPERTY:

See **LOGS AND LOGGING**, 1-4.

Adverse possession. See **ADVERSE POSSESSION**.

Constitutional guaranties of rights of property. See **CONSTITUTIONAL LAW**, 1-6.

In lien of livery stable keeper. See **CRIMINAL LAW**, 1.

Taking for public use. See **EMINENT DOMAIN**.

PUBLICATION:

Service by. See **GARNISHMENT**, 1.

Service of process. See **PROCESS**, 1.

PUBLIC LANDS:

Condemnation of state lands. See EMINENT DOMAIN, 7.

1. **TIDE LANDS—APPRAISEMENT—RIGHTS OF CONTRACTOR EXCAVATING WATER-WAY—LIEN NOT DEPENDENT ON APPRAISEMENT—REMEDY BY FORECLOSURE.** Section 10 of the Act of March 9th, 1893, relating to the excavation of waterways and the filling in of tide lands belonging to the state, which provides that, upon the letting of the contract, the lands shall be appraised and never disposed of for less than the appraised value, is not mandatory in requiring such appraisal to be immediately made; and the contractor, who is given a lien on the filled in tide lands, with an option under certain conditions to purchase the same at the appraised value, is not entitled to a writ of mandamus requiring such appraisal to be made, when the lands had already been sold by the state prior to the completion of the contract; since the law does not require the retention of the lands by the state, and the contractor's lien is not dependent upon the appraisal, his remedy, after a sale of the lands, being an action of foreclosure of the liens, as provided for in the act. *Hays v. Callvert*..... 138
2. **TIDE LANDS—PREFERENCE RIGHT TO LEASE—STATE LAND COMMISSIONERS—ORDER OF SALE—APPEAL—TIME FOR AND BY WHOM TAKEN.** Where the owner of tide lands loses his preference right to lease abutting harbor area by failing to apply in time, he can not appeal from the state land commissioner's order of sale of such right to a third party, when he was a stranger to the proceedings; and such an appeal could not be taken more than thirty days after the order of sale. *McNaught etc. Co. v. Atlantic etc. Co.*..... 669
3. **SAME—ORDER CONFIRMING SALE—RE-SALE—GROUNDS FOR—DISCRETION OF BOARD.** The board of state land commissioners acts in an executive and discretionary manner in confirming a sale of the right to lease harbor area, and the denial of a re-sale is not appealable where the affidavit therefor does not charge that the interests of the state are injuriously affected by fraud or collusion. *Id.*..... 669

PUBLIC USE:

Taking property for public use. See EMINENT DOMAIN.

PUBLIC WORKS:

Eight hour day upon. See CONSTITUTIONAL LAW, 7.

QUIETING TITLE:

Complaint, sufficiency. See HUSBAND AND WIFE, 2.

1. QUIETING TITLE—POSSESSION OF PLAINTIFF—COMPLAINT—SUFFICIENCY. An allegation in a complaint in an action to quiet title that the plaintiffs are entitled to the immediate possession of the property, does not make it appear that the plaintiffs are out of possession, and that ejectment is, therefore, the proper remedy. *McKinley v. Morgan*..... 561
2. QUIETING TITLE—POSSESSION OF PLAINTIFF—NECESSITY OF—ESTOPPEL—FAILURE TO DEMAND JURY OR OBJECT TO FORM OF ACTION. An action to quiet title will not be dismissed by the supreme court on the ground that ejectment was the proper remedy, because of the plaintiffs' failure to allege or prove that they were in possession or that the land was unoccupied, where the defendant answered on the merits and proceeded to trial without demanding a jury, or raising the objection in the court below. *Id.*.. 561
3. QUIETING TITLE—POSSESSION OF PREMISES—STIPULATION AS TO TENANT. An action to quiet title to premises, which are in the possession of a tenant under lease from both parties, should not be dismissed because the plaintiff is not in possession, where a stipulation was entered into between the parties that the tenant should pay no rent until the termination of the action, and should then pay to the prevailing party, since thereby the question of possession is treated as immaterial. *Moran & Co. v. Palmer* 684

RAILROADS:

As employers. See MASTER AND SERVANT, 1, 7.

Carriage of goods and passengers. See CARRIERS.

Contract for clearing right of way, construction. See CONTRACTS, 1-2.

1. RAILROADS—DANGEROUS PREMISES—RIGHT OF WAY—NEGLIGENCE—INJURY TO EJECTED PASSENGER ON RIGHT OF WAY—TRESPASSER. Where a passenger is wrongfully ejected from a train four miles from the city, he is not a trespasser in walking back to town on the right of way, and he does not assume the unusual risk of danger of contact with an unprotected electrically charged third rail, of which he was not warned and had no notice. *Anderson v. Seattle-Tacoma etc. R. Co.*..... 387
2. SAME—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. In an action for personal injuries sustained by a passenger after being wrongfully ejected from a train, by reason of coming in contact with an electrically charged "third" rail while he was walking back along the right

RAILROADS—CONTINUED.

of way, the negligence of the railroad company, and contributory negligence of the plaintiff, is for the jury, and it is error to direct a non-suit, where it appears that the power was carried in an electrically charged unprotected third rail, laid along the ground, and having the appearance of an ordinary rail, that plaintiff was ejected at night at a station four miles from the city, without any notice or warning of the danger, that the road had been open for travel only about one week, and plaintiff did not know that the rail was electrically charged or dangerous, and did not see the warning signs posted at the station, on account of the darkness, and was unfamiliar with the highways in the locality, and his business required an immediate return. *Id.*..... 387

3. RAILROADS—CROSSINGS—KILLING STOCK ON TRACK—WANTON NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for the negligent and wanton killing of stock upon a railroad crossing, there was sufficient evidence to require the questions of negligence and wantonness and contributory negligence to be submitted to the jury, where it appears that the plaintiff and an assistant were driving a band of eighty-six cattle across defendant's railroad tracks at a point where grade approaches were made and gates maintained after the filling in of a trestle (one gate being five hundred feet down the track from the other), that the plaintiff thought the train had gone by and looked and saw no train before opening the gates; that when the cattle were in the act of crossing the track, a passenger train came around a curve 1950 feet distant, at a high rate of speed, and no whistle was sounded, and no bell was rung until just before striking the cattle, after which the train ran two hundred yards before stopping, although there was a direct conflict as to the distance and the ability of the men to stop the train. *Curtis v. Oregon R & Nav. Co.*..... 55
4. RAILROADS—LICENSEE OR TRESPASSER ON TRACK—PRIVATE CROSSING—EVIDENCE—SUFFICIENCY. In an action for the killing of stock upon a railroad track, it is a question for the jury whether the plaintiff was a trespasser, or licensee, where it appears that the track was originally built on a trestle, that a private crossing under the trestle was used for a long time, that, upon filling in the trestle, grade approaches were built and gates maintained, and used for crossing the track, and the plaintiff was driving a band of cattle through the gates and across the track at such —point at the time they were struck. *Id.*..... 55

RAILROADS—CONTINUED.

5. **SAME—DUTY TO LICENSEE AND TRESPASSER.** In the case of a licensee upon a railroad track, the duty of the company is to exercise reasonable care in looking out for and avoiding injury to him; and in the case of a trespasser, the duty is to use reasonable care after discovering his presence, without any duty to be on the lookout. *Id.*..... 55
6. **RAILROADS—CROSSINGS—WANTON NEGLIGENCE—TRIAL—SPECIAL VERDICT.** In an action for the killing of stock upon the track through the alleged wanton neglect of the trainmen, a special verdict, to the effect that the engineer did not make every effort in his power to stop the train as soon as he saw the cattle, amounts to a finding of wanton neglect, and sustains a general verdict for the plaintiff. *Id.*..... 55
7. **RAILROADS—NEGLIGENCE—RIGHT OF WAY—INJURY TO PEDESTRIAN ON TRESTLE—WHEN A TRESPASSER.** Where railroad companies constructed a trestle over the tide flats, for a side and storage track, upon which no planks were laid for foot passengers, and which was unusually narrow and with gaps at the sides by reason of missing ends of ties, so that it was difficult of passage and seldom used when cars were stored thereon, although such track furnished a convenient way from a city street to the manufacturing plants on the water front, and was, when not obstructed by cars, extensively used for that purpose without any objection being made by the railroads, a right of way along the track is not acquired by user, and one who attempts to use it while occupied by cars, which he tries to pass, is a trespasser; and when such person is injured before being discovered by trainmen coupling the cars, the company is not liable for failure to keep a lookout, as for a licensee, and a nonsuit is properly directed. *Dotta v. Northern Pac. R. Co.*..... 506
8. **SAME—DOCTRINE OF LAST CLEAR CHANCE.** In such a case the doctrine of the "Last clear chance" has no application, since the defendants had no knowledge that movement of the cars would result in injury to the plaintiff. *Id.*..... 506

REAL PROPERTY:

See ADVERSE POSSESSION; BOUNDARIES; COUNTIES; QUIETING TITLE; PUBLIC LANDS; VENDOR AND PURCHASER.
 Building to be moved and leased with lot. See LANDLORD AND TENANT, 1.
 Leases of. See FRAUDS, STATUTE OF, 1-7.
 Rental values, instructions. See EJECTMENT, 1.

RECEIVERS:

- Appointment, supersedeas. See **APPEAL AND ERROR**, 15.
- Appointment of, review, amendment of complaint. See **APPEAL AND ERROR**, 25.
- Assessment against stockholders. See **APPEAL AND ERROR**, 1, 2.
- Delay of, does not toll statute of limitations. See **BANKS AND BANKING**, 3.
- Discharge, party interested in review. See **CERTIORARI**, 1.
- Of insolvent corporation, possession of attached property. See **CORPORATIONS**, 2, 3.

1. **RECEIVERS—INJUNCTION—AGREEMENT TO SELL EXCLUSIVELY CERTAIN BEER—EVIDENCE OF SURRENDER OF AGREEMENT—SUFFICIENCY—FINDINGS NOT SUPPORTED BY PREPONDERANCE OF EVIDENCE—AFFIDAVITS.** Where plaintiff, a brewing company, signed a lease of premises to be used for a restaurant and saloon, as surety for payment of the rent, in consideration of which the defendants, who were the actual tenants, agreed to use and sell exclusively the plaintiff's beer in the conduct of said business, in an action for a receiver brought by the plaintiff alleging it to be a half owner of the leased premises, and seeking an injunction against the sale by defendants of any beer other than plaintiff's beer, findings in favor of the plaintiff are not sustained, and there is no necessity for a receiver or an injunction, where it appears that the plaintiff had no interest in the lease, but signed as surety only, that money loaned by plaintiff to the defendants to fit up the place had been repaid, that the plaintiff was actuated by a vindictive spirit in bringing the suit, that defendants offered access to their books to show the amount of their sales of beer and offered security against damage thereby, and where it appears by a preponderance of the evidence (which was wholly by affidavits) that the plaintiff had surrendered its so-called beer contract in consideration of being released from liability as surety for the rent. *Seattle Brewing & Malting Co. v. Jensen*..... 462
2. **RECEIVERS—APPOINTMENT—SUFFICIENCY OF SHOWING.** Under the rule of this court to appoint a receiver only where it is necessary to prevent the property from being wasted or lost, it is error to appoint a receiver of a corporation, at the suit of one claiming to hold the majority of the stock, and whom the officers refused to recognize as a stockholder, where the proofs consisted of affidavits showing a dispute as to the rightful ownership of the stock. *Belding v. Washington Cornice Co.*..... 549

RECITALS:

In judgment. See JUDGMENT, 1.

RECORDS:

Transcript on appeal. See APPEAL AND ERROR, 16.

Public, review of findings as to. See APPEAL AND ERROR, 20.

1. RECORDS — COUNTY TREASURER — INSPECTION — KEPT AT PUBLIC EXPENSE. The fact that certain records of the county treasurer were kept at public expense does not establish that they are public records, open to inspection by the public. *State ex rel. Cook v. Reed* 638
2. SAME—DEMAND FOR INSPECTION—MANDAMUS. A general demand by a private citizen for an inspection of "any and all books of public records" desired by him, cannot be made the basis for a writ of mandate to the county treasurer, especially where the treasurer is willing to furnish specific information called for, free of charge. *Id* 638

REPLEVIN:

1. REPLEVIN—SOURCE OF TITLE—PLEADING—DEFENSES—SHOWING INVALIDITY OF TITLE UNDER GENERAL DENIAL. Where the plaintiff in an action of replevin alleges generally the ownership and right of possession of certain wheat, and at the trial claims by virtue of a written lease of the lands on which the wheat was raised, the defendants may show the invalidity of the lease under a general denial, since they need not anticipate the source of plaintiff's title when the same is not disclosed by the complaint. *Coey v. Low*.. 10
2. REPLEVIN—WHEAT RAISED UNDER INVALID LEASE—POSSESSORY RIGHTS—INDIAN LEASE NOT APPROVED BY DEPARTMENT. Where the plaintiff leased lands in a reservation from the Indian owner by a written lease, which was void because not approved by the Indian department, and subsequently sublet the same on shares, furnishing the seed and paying for threshing the wheat raised, and his share was set aside for him by the sub-tenants, but the same came into the possession of the Indian owners of the land, claiming the right thereto, replevin will not lie in favor of the plaintiff on the theory that courts will protect the possessory right under such circumstances; since the plaintiff was never in the actual possession of the land or the wheat, and cannot claim constructive possession by virtue of an unlawful lease. *Id*..... 10

RESCISSION:

- Of contract, partial. See COVENANTS, 1, 2.
- Of contract to locate timber claims. See FRAUD, 2, 3.
- Of sale of machinery. See FRAUD, 1.
- Of contract for sale of land. See VENDOR AND PURCHASER, 1, 2.

REVIEW:

- See APPEAL AND ERROR, 24-48; CERTIORARI; CRIMINAL LAW, 6-9, 13, 14.

RIGHT OF WAY:

- Acquisition by prescription. See ADVERSE POSSESSION, 3-6.
- Licensee upon. See RAILROADS.
- Across state lands. See EMINENT DOMAIN, 7.

RIPARIAN RIGHTS:

- See WATERS AND WATER COURSES, 2.

ROADS:

- Streets in cities. See MUNICIPAL CORPORATIONS, 3-5.

SALES:

- Of county property. See COUNTIES, 1.
- Of goods in bulk. See FRAUDULENT CONVEYANCES, 1-5.
- Of machinery, rescission for fraud. See FRAUD, 1.
- Of realty. See VENDOR AND PURCHASER.
- Of right to lease tide lands, confirmation. See PUBLIC LANDS, 2-3.

SCHOOLS AND SCHOOL DISTRICTS:

- Condemnation of school lands. See EMINENT DOMAIN, 7.
 - Patron of, interpleading in suit against board. See INTERPLEADER, 2.
 - Teacher's salary. See MANDAMUS, 4.
1. SCHOOLS—STATE BOARD OF EDUCATION—UNIFORM SYSTEM OF TEXT BOOKS. Under Laws, 1897, p. 356, the state board of education has the exclusive power to adopt a uniform series of text books and prepare a general course of study for the public schools. *Westland Publishing Co. v. Royal*..... 399
 2. SAME—FOLLOWING COURSE PRESCRIBED BY STATE BOARD. It is the duty of school directors to follow the course of study prescribed by the state board of education. *Wagner v. Royal*..... 423
 3. SAME—CHANGE IN TEXT BOOK. It is not a sufficient excuse for a school district to refuse to follow the course of study prescribed

SCHOOLS AND SCHOOL DISTRICTS—CONTINUED.

by the state board of education that certain changes have been made in the text book prescribed, where the contract with the state board for such book provided for the changes therein. *Id* 423

4. SCHOOLS—COURSE OF STUDY ADOPTED BY STATE BOARD—EVIDENCE OF ADOPTION—SUFFICIENCY. There is sufficient evidence to support a finding that the state board of education adopted a uniform series of text books and a course of study for the public schools, where it appears that the same was published throughout the state, apparently by their authority, and was generally recognized as valid and acted upon by school districts, including the defendant. *Rand, McNally & Co. v. Royal*..... 420
Wagner v. Royal..... 423
5. SAME—CONTRACT WITH PUBLISHER TO FURNISH TEXT BOOKS—VALIDITY—ATTACK BY SCHOOL DISTRICT. Where the state board of education has entered into a written contract with a publisher for furnishing the text books prescribed by the course of study for the public schools of the state, a school district can not question its validity in an action brought to enjoin the district from using other books on the same subject, when the state has raised no objection thereto; since the district was not a party to the contract. *Rand, McNally & Co. v. Royal*..... 420
Wagner v. Royal..... 423
6. SCHOOLS—STATE BOARD OF EDUCATION—CONTRACTS—EXECUTION OF AGREEMENT TO FURNISH TEXT BOOKS. A contract with a publisher to furnish text books for the use of the public schools of the state appears to be sufficiently executed by the state board of education when it is signed by the president and secretary of the board, when it was suggested by the board, without objection, at the time the subject was discussed, that such signatures would be sufficient. *Rand, McNally & Co. v. Royal*..... 420
7. SCHOOLS—FOLLOWING COURSE OF STUDY PRESCRIBED BY STATE BOARD—BOND OF PUBLISHER—APPROVAL. The fact that the publisher of text books, who is under contract with the state board of education to supply all the books required by the public schools of the state, fails to have its bond to the state duly approved, does not excuse a school district board for failing to enforce the course of study prescribed by the state board. *Rand, McNally & Co. v. Royal*..... 420
Wagner v. Royal..... 423
8. SCHOOL DISTRICT—CLASS OF—NUMBER OF TEACHERS EMPLOYED—PLEADING AND PROOF—AMENDMENT. A finding that a school district is of the class employing more than one teacher is sup-

SCHOOLS AND SCHOOL DISTRICTS—CONTINUED.

ported by the evidence where three teachers of the district testify, and the pleadings may be considered amended to bring the same within the issue determined. *Westland Publishing Co. v. Royal*... 399

9. SAME—COURSE OF STUDY INCONSISTENT WITH STATE COURSE. Where the course of study prescribed by the state board of education for public schools under §27 of the school code requires the use of certain text books and writing tablets in certain specified grades, a course of study prescribed by the directors of a school district, requiring such text books to be supplemented by the use of others on the same subject, is inconsistent with the law of the state, and is not authorized by § 73 of the school code giving such directors the power to grade the schools, nor by the fact that §§ 73 and 27 are apparently repugnant. *Id.*..... 399
10. SAME—FOLLOWING STATE COURSE OF STUDY—GRADING SCHOOLS —DIFFERENT CLASSES IN SAME YEAR. Where the directors of a school district divided the sixth year into two classes, A and B, the latter being promoted into the former after the first half of the year, the requirement by the school district that the text book prescribed by the state board of education for the sixth grade be used in class A only, is not a violation of the rights of the publisher, since the state course does not contemplate the use of the publication at all times during the year, especially where it appears that it is used until the pupils become proficient therein, and since no damage is shown where it does not appear that there were any pupils in the sixth grade who did not purchase and use the book during the year. *Id.*..... 399
11. SAME—UNIFORM COURSE OF STUDY—SCHOOL DISTRICT REGULATIONS—COMPLIANCE WITH STATE COURSE. Where the course of study prescribed by the state board of education requires the use of certain text books in specified grades, a regulation of a school district that the pupils in such grades shall use such books until they become "proficient therein" is a sufficient compliance with the state course of study. *Rand, McNally & Co. v. Royal*..... 420
Wagner v. Royal..... 428
12. SAME—INJUNCTION. But in such case, where such books prescribed in the state course of study are not required by the district to be used at all in a certain grade, whether inadvertently or intentionally, it is not a compliance with the state course of study, and injunction is properly issued to compel compliance therewith by the district. *Id.*..... 420

SCHOOLS AND SCHOOL DISTRICTS—CONTINUED.

13. SAME—DAMAGE. A finding that the publisher of a text book prescribed for use in the public schools by the state board of education is not damaged by the fact that the book is not used during the entire year in certain grades, is warranted by the evidence where it appears that all the pupils in such grades were required to purchase the book and use the same until they become proficient therein. *Wagner v. Royal*..... 428
14. SAME—REMEDY FOR FAILURE OF DISTRICT TO FOLLOW STATE COURSE OF STUDY—INJUNCTION—MATERIAL DAMAGES. Where a school district refuses to follow the course of study adopted by the state board of education, the publisher of the books (under contract with the state board) is not entitled to relief by injunction unless materially damaged, and an injunction will not be issued because one teacher testified that more of plaintiff's writing tablets would have been used if they had not been supplemented by other copy books, when it does not appear how many more would have been used, and when the tablets were used in all the grades prescribed, and one more. *Westland Publishing Co. v. Royal*..... 399
15. SCHOOLS—UNIFORM COURSE OF STUDY—COMPLIANCE WITH COURSE PRESCRIBED BY STATE BOARD OF EDUCATION—DAMAGES. Where the course of study prescribed by the state board of education requires the use of a certain text book in specified grades, and the evidence shows that as to one of such grades it was not adopted by the school district, it may be assumed that the publisher is deprived of a portion of the benefit which it is entitled to receive from its contract to supply all of such books required by the public schools of the state, and an injunction should issue at the suit of the publisher, requiring the school directors to cause the same to be used in the grades for which it was prescribed. *Eaton & Co. v. Royal* 435
16. SCHOOLS AND SCHOOL DISTRICTS—CONTRACT TO TEACH SCHOOL—VALIDITY. It is error to dismiss a proceeding in mandamus to enforce a teachers' contract to teach school, on the theory that it was illegal to contract to teach a district school forming a part of a union district, and at the same time to teach in a union high school in the same building, as there is nothing illegal in such contract. *State ex rel. Brown v. McQuade*..... 579

SEDUCTION:

See CRIMINAL LAW, 4.

SETTLEMENT:

See DIVORCE, 2.

Of case on appeal. See APPEAL AND ERROR, 17-21.

SIDEWALKS:

See MUNICIPAL CORPORATIONS, 3-5.

STATEMENT:

Of case or facts for purpose of review. See APPEAL AND ERROR, 17-21.

STATES:

Public lands. See PUBLIC LANDS, 1-3.

Right to fix eight hour day on public works. See CONSTITUTIONAL LAW, 7.

State board of education, uniform course of study. See SCHOOLS AND SCHOOL DISTRICTS, 1-15.

STATUTE OF LIMITATIONS:

See LIMITATION OF ACTIONS.

STATUTES:

See CRIMINAL LAW, 2, 4, 5, 7; LIMITATION OF ACTIONS, v; MECHANICS' LIENS; PUBLIC LANDS, 1-3; SCHOOLS AND SCHOOL DISTRICTS. Bulk stock laws, see FRAUDULENT CONVEYANCES, 1-5.

Common law, modification of. See FRAUDS, STATUTE OF, 2, 5, Laws interfering with liberty to contract. See CONSTITUTIONAL LAW, 7.

Negotiable instrument law, construction. See BILLS AND NOTES, 1, 3.

Statute of frauds. See FRAUDS, STATUTE OF.

1. STATUTES — TITLE OF ACT — SUFFICIENCY — EMINENT DOMAIN— RIGHT OF WAY FOR IRRIGATION. Laws 1899, p. 261, entitled, "An act providing for condemnation proceedings for right of way for irrigation ditches, canals and flumes for agricultural and mining purposes, and relating to right of appropriation of water," is not unconstitutional as embracing more than one subject, since its subject relates singly to the right of appropriation of waters, and all the subsidiary details are germane thereto, and are means for carrying the object into effect, and necessary for its enforcement. *Weed v. Goodwin*..... 31

QUIETING TITLE:

Complaint, sufficiency. See HUSBAND AND WIFE, 2.

1. QUIETING TITLE—POSSESSION OF PLAINTIFF—COMPLAINT—SUFFICIENCY. An allegation in a complaint in an action to quiet title that the plaintiffs are entitled to the immediate possession of the property, does not make it appear that the plaintiffs are out of possession, and that ejectment is, therefore, the proper remedy. *McKinley v. Morgan*..... 561
2. QUIETING TITLE—POSSESSION OF PLAINTIFF—NECESSITY OF—ESTOPPEL—FAILURE TO DEMAND JURY OR OBJECT TO FORM OF ACTION. An action to quiet title will not be dismissed by the supreme court on the ground that ejectment was the proper remedy, because of the plaintiffs' failure to allege or prove that they were in possession or that the land was unoccupied, where the defendant answered on the merits and proceeded to trial without demanding a jury, or raising the objection in the court below. *Id.*.. 561
3. QUIETING TITLE—POSSESSION OF PREMISES—STIPULATION AS TO TENANT. An action to quiet title to premises, which are in the possession of a tenant under lease from both parties, should not be dismissed because the plaintiff is not in possession, where a stipulation was entered into between the parties that the tenant should pay no rent until the termination of the action, and should then pay to the prevailing party, since thereby the question of possession is treated as immaterial. *Moran & Co. v. Palmer* 684

RAILROADS:

As employers. See MASTER AND SERVANT, 1, 7.

Carriage of goods and passengers. See CARRIERS.

Contract for clearing right of way, construction. See CONTRACTS, 1-2.

1. RAILROADS—DANGEROUS PREMISES—RIGHT OF WAY—NEGLIGENCE—INJURY TO EJECTED PASSENGER ON RIGHT OF WAY—TRESPASSER. Where a passenger is wrongfully ejected from a train four miles from the city, he is not a trespasser in walking back to town on the right of way, and he does not assume the unusual risk of danger of contact with an unprotected electrically charged third rail, of which he was not warned and had no notice. *Anderson v. Seattle-Tacoma etc. R. Co.*..... 387
2. SAME—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. In an action for personal injuries sustained by a passenger after being wrongfully ejected from a train, by reason of coming in contact with an electrically charged "third" rail while he was walking back along the right

RAILROADS—CONTINUED.

of way, the negligence of the railroad company, and contributory negligence of the plaintiff, is for the jury, and it is error to direct a non-suit, where it appears that the power was carried in an electrically charged unprotected third rail, laid along the ground, and having the appearance of an ordinary rail, that plaintiff was ejected at night at a station four miles from the city, without any notice or warning of the danger, that the road had been open for travel only about one week, and plaintiff did not know that the rail was electrically charged or dangerous, and did not see the warning signs posted at the station, on account of the darkness, and was unfamiliar with the highways in the locality, and his business required an immediate return. *Id.*..... 387

3. RAILROADS — CROSSINGS — KILLING STOCK ON TRACK — WANTON NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — EVIDENCE — SUFFICIENCY. In an action for the negligent and wanton killing of stock upon a railroad crossing, there was sufficient evidence to require the questions of negligence and wantonness and contributory negligence to be submitted to the jury, where it appears that the plaintiff and an assistant were driving a band of eighty-six cattle across defendant's railroad tracks at a point where grade approaches were made and gates maintained after the filling in of a trestle (one gate being five hundred feet down the track from the other), that the plaintiff thought the train had gone by and looked and saw no train before opening the gates; that when the cattle were in the act of crossing the track, a passenger train came around a curve 1950 feet distant, at a high rate of speed, and no whistle was sounded, and no bell was rung until just before striking the cattle, after which the train ran two hundred yards before stopping, although there was a direct conflict as to the distance and the ability of the men to stop the train. *Curtis v. Oregon R. & Nav. Co.*..... 55
4. RAILROADS—LICENSEE OR TRESPASSER ON TRACK—PRIVATE CROSSING—EVIDENCE—SUFFICIENCY. In an action for the killing of stock upon a railroad track, it is a question for the jury whether the plaintiff was a trespasser, or licensee, where it appears that the track was originally built on a trestle, that a private crossing under the trestle was used for a long time, that, upon filling in the trestle, grade approaches were built and gates maintained, and used for crossing the track, and the plaintiff was driving a band of cattle through the gates and across the track at such —point at the time they were struck. *Id.*..... 55

RAILROADS—CONTINUED.

5. SAME—DUTY TO LICENSEE AND TRESPASSER. In the case of a licensee upon a railroad track, the duty of the company is to exercise reasonable care in looking out for and avoiding injury to him; and in the case of a trespasser, the duty is to use reasonable care after discovering his presence, without any duty to be on the lookout. *Id.*..... 55
6. RAILROADS—CROSSINGS—WANTON NEGLECT—TRIAL—SPECIAL VERDICT. In an action for the killing of stock upon the track through the alleged wanton neglect of the trainmen, a special verdict, to the effect that the engineer did not make every effort in his power to stop the train as soon as he saw the cattle, amounts to a finding of wanton neglect, and sustains a general verdict for the plaintiff. *Id.*..... 55
7. RAILROADS—NEGLIGENCE—RIGHT OF WAY—INJURY TO PEDESTRIAN ON TRESTLE—WHEN A TRESPASSER. Where railroad companies constructed a trestle over the tide flats, for a side and storage track, upon which no planks were laid for foot passengers, and which was unusually narrow and with gaps at the sides by reason of missing ends of ties, so that it was difficult of passage and seldom used when cars were stored thereon, although such track furnished a convenient way from a city street to the manufacturing plants on the water front, and was, when not obstructed by cars, extensively used for that purpose without any objection being made by the railroads, a right of way along the track is not acquired by user, and one who attempts to use it while occupied by cars, which he tries to pass, is a trespasser; and when such person is injured before being discovered by trainmen coupling the cars, the company is not liable for failure to keep a lookout, as for a licensee, and a nonsuit is properly directed. *Dotta v. Northern Pac. R. Co.*..... 506
8. SAME—DOCTRINE OF LAST CLEAR CHANCE. In such a case the doctrine of the "Last clear chance" has no application, since the defendants had no knowledge that movement of the cars would result in injury to the plaintiff. *Id.*..... 506

REAL PROPERTY:

See ADVERSE POSSESSION; BOUNDARIES; COUNTIES; QUIETING TITLE; PUBLIC LANDS; VENDOR AND PURCHASER.
 Building to be moved and leased with lot. See LANDLORD AND TENANT, 1.
 Leases of. See FRAUDS, STATUTE OF, 1-7.
 Rental values, instructions. See EJECTMENT, 1.

RECEIVERS:

- Appointment, supersedeas. See **APPEAL AND ERROR**, 15.
- Appointment of, review, amendment of complaint. See **APPEAL AND ERROR**, 25.
- Assessment against stockholders. See **APPEAL AND ERROR**, 1, 2.
- Delay of, does not toll statute of limitations. See **BANKS AND BANKING**, 3.
- Discharge, party interested in review. See **CERTIORARI**, 1.
- Of insolvent corporation, possession of attached property. See **CORPORATIONS**, 2, 3.

1. **RECEIVERS—INJUNCTION—AGREEMENT TO SELL EXCLUSIVELY CERTAIN BEER—EVIDENCE OF SURRENDER OF AGREEMENT—SUFFICIENCY—FINDINGS NOT SUPPORTED BY PREPONDERANCE OF EVIDENCE—AFFIDAVITS.** Where plaintiff, a brewing company, signed a lease of premises to be used for a restaurant and saloon, as surety for payment of the rent, in consideration of which the defendants, who were the actual tenants, agreed to use and sell exclusively the plaintiff's beer in the conduct of said business, in an action for a receiver brought by the plaintiff alleging it to be a half owner of the leased premises, and seeking an injunction against the sale by defendants of any beer other than plaintiff's beer, findings in favor of the plaintiff are not sustained, and there is no necessity for a receiver or an injunction, where it appears that the plaintiff had no interest in the lease, but signed as surety only, that money loaned by plaintiff to the defendants to fit up the place had been repaid, that the plaintiff was actuated by a vindictive spirit in bringing the suit, that defendants offered access to their books to show the amount of their sales of beer and offered security against damage thereby, and where it appears by a preponderance of the evidence (which was wholly by affidavits) that the plaintiff had surrendered its so-called beer contract in consideration of being released from liability as surety for the rent. *Seattle Brewing & Malting Co. v. Jensen*..... 462
2. **RECEIVERS—APPOINTMENT—SUFFICIENCY OF SHOWING.** Under the rule of this court to appoint a receiver only where it is necessary to prevent the property from being wasted or lost, it is error to appoint a receiver of a corporation, at the suit of one claiming to hold the majority of the stock, and whom the officers refused to recognize as a stockholder, where the proofs consisted of affidavits showing a dispute as to the rightful ownership of the stock. *Belding v. Washington Cornice Co.*..... 549

VENDOR AND PURCHASER—CONTINUED.

purchaser is constructive notice that a forfeiture has been declared. *Moran & Co. v. Palmer* 684

2. SAME—ACQUIESCENCE IN FORFEITURE. In such a case, where the purchaser makes no offer to pay for several years, but states that he will buy the property when he can get it at a satisfactory price, he acquiesces in the forfeiture of the contract. *Id.* 684

VERDICT:

Excessive. See DAMAGES, 1, 2; MALICIOUS PROSECUTION, 3.
 In civil actions. See TRIAL, 7.
 Review on appeal. See APPEAL AND ERROR, 37.

WAIVER:

Error waived in appellate court. See APPEAL AND ERROR.
 Jury trial. See JURY, 1, 2.
 Of notice of accident. See INDEMNITY, 2.
 Of notice of acts involving loss. See INDEMNITY, 7.
 Of objections. See PLEADINGS, 4.

WARRANTS:

For teacher's salary. See MANDAMUS, 4.

WARRANTY:

Sale of machinery. See FRAUD, 1.

WAREHOUSEMAN:

Loss of goods. See CARRIERS, 4, 5.

WATERS AND WATER COURSES:

Appropriation of, title of act. See STATUTES, 1.
 Excavation of waterways and filling tide lands. See PUBLIC LANDS.

1. WATERS—NUISANCE—OBSTRUCTION TO NAVIGATION—USE OF STREAM FOR BOOMING LOGS. It is not error to refuse to find a nuisance in the obstruction of navigation by a boom company, where it does not appear at the time of the trial that there are any logs in the river and where the defendant was an incorporated boom company and its use of the stream was a lawful use under the statute. *Lownsdale v. Grays Harbor Boom Co.* 198
2. WATERS—NAVIGATION—LOGS AND LOGGING—RIPARIAN RIGHTS—USE OF BANKS OF STREAM ABOVE HIGH TIDE. The right of floatage of logs down a navigable stream does not carry with it a right to the use of the banks above the line of high tide, but only to the use of the highway at all stages of the water. *Id.* 198

WHARVES:

Negligence in maintaining. See CARRIERS, 2, 3.

WIDOWS:

Allowance to. See EXECUTORS AND ADMINISTRATORS, 4, 5.

WILLS:

As evidence of rightful possession. See FIRES, 2.

WITNESSES:

See EVIDENCE.

Credibility of. See CRIMINAL LAW, 8.

Experts. See EVIDENCE, 2, 3.

Impeachment. See CRIMINAL LAW, 10, 11.

Indorsement of names of, on indictment. See CRIMINAL LAW, 19.

WORK AND LABOR:

See CONSTITUTIONAL LAW, 7.

Liens for work and materials. See MECHANICS' LIENS.

WRITS:

See EXECUTION, 1; MANDAMUS; PROCESS; PROHIBITION.

Writ of review. See CERTIORARI.

*Ex. J. M.
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